Public Utilities

FORTNIGHTLY

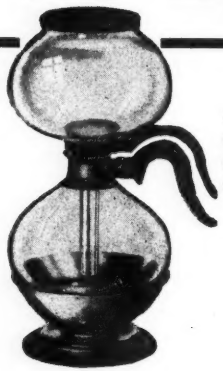
March 2, 1939

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

[LOAD BUILDING FORMULA]

97 KWH

EXTRA LOAD



Anyheet Control Model . . . keeps coffee at drinking temperature indefinitely, builds added load. Retails from

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Priced within easy reach of almost every family on your lines, the Silex offers you one of your greatest appliance load building opportunities. Why not make the most of it? Pyrex Brand Glass used exclusively.

FOR YOUR PACKAGE ASSORTMENT

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If you are planning to merchandise an appliance package, be sure to consider the Silex Glass Coffee Maker. It's been the backbone of many successful utility company promotions. Along with other popular appliances, the $4.95 Electric Table Model Silex will help you build a package that's sure to be a hit. Write for information and suggestions.

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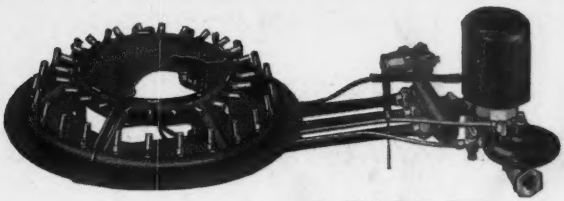

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Public Utilities Fortnightly

VOLUME XXIII *March 2, 1939* NUMBER 5

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¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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Pages with the Editors

NATIONAL defense is another one of those euphonious objectives, such as national prosperity or national morality, which everybody is in favor of as a matter of principle. But when it gets down to specific application, there are as many theories about the *modus operandi* as there are stars in the heaven.

PRESIDENT Roosevelt, in his general message on this subject early in the congressional session, presented a threefold classification of the requirements for mobilization to meet the challenge of the foreign dictators: (1) The need for technical armament; (2) the need for defense organization and strategic location; (3) the need for high civil morale. Under the third group he astutely blanketed virtually all of the major social and economic reforms of the New Deal.

ON the other hand, one of the President's critics from the Right wing of his own party, U. S. Senator Byrd of Virginia, gave as his opinion that the national defense can be best supported by a strong national credit buttressed by a balanced budget. He rejected deficit financing to allow for free government spending as an aid to national preparedness.

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LESTER VELIE

Is there no end to the downward drift of electric rates?

(See Page 278)

HERBERT COREY

Is the national defense program a Trojan horse for government ownership?

(See Page 259)

He rejected this with the blunt and homely assertion that a well prepared nation must necessarily be a solvent one.

EVEN when one gets into the mechanics of national defense, this conflict of opinion persists. Some want a bigger navy; some a bigger air force. Some would prepare our naval defenses, looking toward trouble from the East. Some would leave the European nations of the East to stew in their own juice and prepare our defenses exclusively towards the direction of the setting sun. And even in the latter group differences rage as to whether we ought to draw the line of fortification midway across the pacific at Hawaii or to push it under the very nose of the Son of Heaven at the remote island of Guam.

WHEN we come to the domestic planning for national defense, the public utility companies, particularly the electric utility industry, have a definite stake. It has been charged that our power reserves along the densely populated eastern seaboard are not sufficient to cope with the sudden demands of a possible national emergency. And the electric utility industry, cynical after six years of hostility from the New Deal, has been wondering if this was just another subtle plan of the ad-

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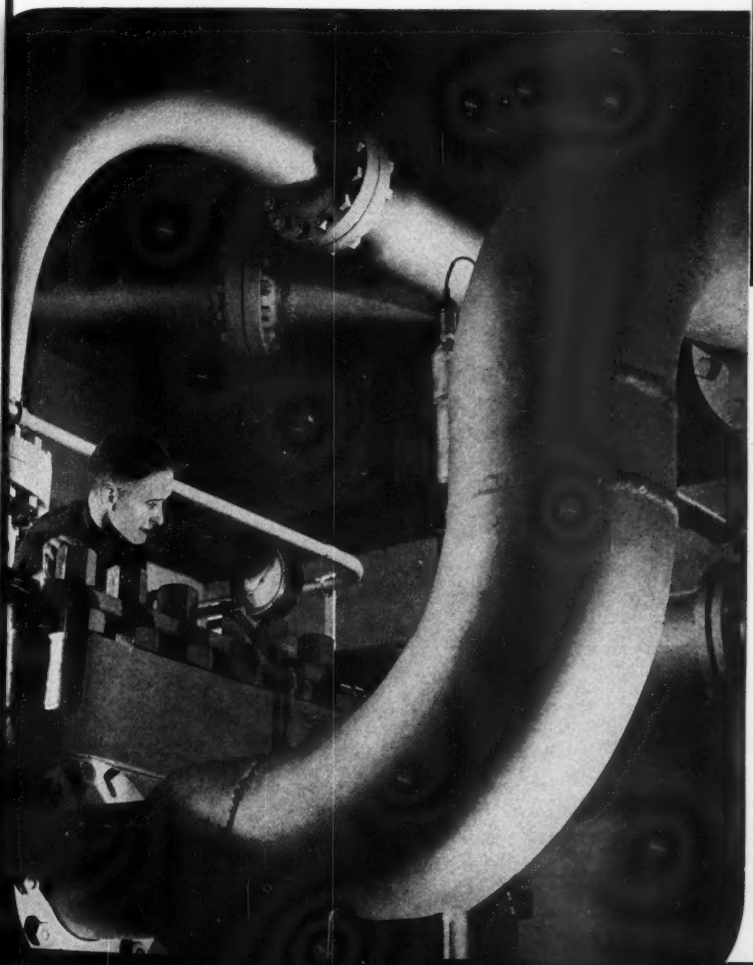

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ministration to badger the private electric industry with additional restrictions or encourage public ownership, under the guise of patriotic preparedness.

In this issue Herbert Corey, well-known Washington business writer and former military correspondent, analyzes the signs on the Washington horizon in an effort to determine whether or not the administration really wants the reciprocal coöperation of the private electric industry in building up better power reserves and coördination of connections under the framework of private management, or whether the whole thing is simply a new form of the old army game. You can read Mr. Corey's conclusions for yourself, starting page 259.

While advocates of preparedness ponder the sufficiency of power reserves on the eastern seaboard, students of utility economy are wondering whether the large amount of government hydroelectric installation in the far West and Southwest will result in a surplus power supply. This has been repeatedly denied by J. D. Ross, who, as the administrator of Bonneville, probably will bring into production much more electric power within the next few years. Mr. Ross is of the opinion that power demand normally doubles itself about every seven years and that any surplus supply we may have now is only of a temporary character.

In the Southwest, where there also has been a considerable amount of dam building, a similar question naturally arises. In this issue we have an article by Olaf D. Baker which discusses the spreading demand for electric power in this area (starting page 270).

Mr. Baker's article is based upon the increasing demand for power stimulated by private operations as well as the public plants. He is a former insurance man and banker who has been living in Miami, Oklahoma, for the last thirty-four years. He has written a number of other articles for business publications.

Demand for utility service obviously depends on rate levels. It is a hackneyed question whether low rates stimulate demand or demand stimulates low rates. But it is a known fact that regardless of demand, the pressure of state and Federal agencies on utility rates has been consistently downward. Lester Velie discusses this assault on the rates of the electric industry in his article which begins on page 278.

Mr. Velie is the financial editor of the *New York Journal of Commerce*, who specializes on utilities and railroad items. Born in Kiev, Russia, Mr. Velie came to Milwaukee as a child and graduated from the University of Wisconsin (A. B., 1929). After supplementary education at New York University School of Commerce, he embarked on a career of financial writing and editing during which he became associated with the staffs of several publications. He has contributed to *Nation's Business, Barron's,* and similar magazines.

OLAF D. BAKER

The Southwest wakes up to its need for electric power.

(See Page 270)

Apropos of international matters, we shall soon publish another manuscript from Louise C. Mann, which deals with the public utility situation in South America.

Among the important decisions preprinted from *Public Utilities Reports* in the back of this number, may be found the following:

A restoration charge has been held by the highest court of New York to be a service charge prohibited by statute. (See page 353.)

Restrictions upon the right of public utilities to exempt themselves from liability to customers have been decreed by the New York commission. (See page 373.)

The holding of a lower court that the extension of maturity of securities by stamping constitutes issuance of securities requiring commission approval has been sustained by the United States Circuit Court of Appeals. (See page 399.)

The next number of this magazine will be out March 16th.

The Editors

In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 353-416, from 26 P.U.R.(N.S.)

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Armour & Company ..... Chicago, Ill.
Sharpsburg Municipal Light Plant, Sharpsburg, Pa.
Minneapolis Brewing Company, Minneapolis, Minn.
Stegmaier Brewing Company ... Wilkes-Barre, Pa.
Webster Electric Company .... Racine, Wisconsin
Bellefield Boiler Plant ..... Pittsburgh, Pa.
Nunn Bush Shoe Company ..... Milwaukee, Wis.
West End Technical School .. Toronto, Ont., Can.
Madison College ..... Harrisonburg, Va.
O'Okiep Copper Company ..... So. Africa
Florida Power Corporation .. St. Petersburg, Fla.
Compania Marx, S. A. ..... Mexico, D. F.
Socony-Vacuum Oil Company .... Paulsboro, N. J.
The Baltimore Transit Company ... Baltimore, Md.
National Park College ..... Forest Glen, Md.
City of Columbia ..... Columbia, Mo.
Sun Oil Company ..... Toledo, Ohio
Jenkins Brothers ..... Bridgeport, Conn.
Ladish Stoppenbach Co. ..... Jefferson Jct., Wis.
Puerto Rico Railway Light & Power, San Juan, P.R.
Sun Oil Company ..... Marcus Hook, Pa.
Chicago, Milwaukee, St. Paul & Pacific R.R., Chicago, Ill.
Great Northern Ry. ..... Hallyard, Wash.
Scott Paper Company ..... Chester, Pa.
American Oil Company ..... Carteret, N. J.
Westinghouse Elec. & Mfg. Company, Copper Mill, Pittsburgh, Pa.
City Light Plant ..... Freeburg, Illinois
New York & Pennsylvania Company Inc., Lock Haven, Pa.
Electric Light & Power Plant, Traverse City, Mich.
Portsmouth Gas Company ..... Portsmouth, Va.
Borough of Lansdale ..... Lansdale, Pa.
U. S. Navy Testing Units at: .. Mare Island, Calif. Philadelphia, Pa. Brooklyn, N. Y. Norfolk, Va. Bremerton, Wash.
Philadelphia Electric Company, Philadelphia, Pa.
City of Holland ..... Holland, Michigan
Abingdon Research Laboratory .... Abingdon, Va.
Pittsburgh & Lake Erie R.R. ..... Pittsburgh, Pa.
Cuba Distilling Company ..... Havana, Cuba
Armour Institute of Technology ..... Chicago, Ill.
Capitol Power Plant ..... Jefferson City, Mo.
Latonia Refining Company ..... Latonia, Ky.
New York Dock Company ..... Brooklyn, N. Y.
Mac Sim Bar Paper Co. ..... Otsego, Mich.
University of Florida ..... Gainesville, Florida
Globe Steel Tube Company ..... Milwaukee, Wis.
Johns Manville Corporation ..... Jarratt, Va.
Philadelphia Quartz Company .. Jeffersonville, Ind.

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Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

RAYMOND MOLEY
Former Presidential Adviser.

"The winter of its [business] discontent is coming to a close."

LOUIS GUENTHER
Publisher, Financial World.

"Throughout the depression no industry gave a better account of itself than did the utilities."

BEN W. LEWIS
Professor, Oberlin College.

"There is no positive regulator like competition. We have known its complete absence too long. The gadfly of government competition can sting regulation into a driving force."

FLOYD W. PARSONS
Editorial Director, Gas Age.

". . . most of the battles that have taken place between gas and electricity have found the gas utilities generally endeavoring to defend themselves against what might be called blows below the belt."

JOHN E. RANKIN
U. S. Representative from Mississippi.

"We cannot reach every home in America with TVA power, but we can reach them with TVA yardstick rates—and we are going to do it by forcing rate reductions to their proper levels in every community throughout the country."

WILLIAM O'NEIL
President, General Tire & Rubber Company.

"There is no less a frontier now than there was 100 years ago. The frontier of industrial development is inexhaustible, but you will never develop that frontier when you cripple your pioneers with a set of rules based on pessimism and futilitarianism."

HARRY R. HERRMANN
Writing in The Commentator.

"One main difficulty with radio writing as an art is the fact that it flourishes without benefit of authoritative criticism . . . Authoritative criticism of a radio sketch before it is produced smacks dangerously of censorship, and criticism after production is useless."

EDWARD R. BURKE
U. S. Senator from Nebraska.

"The time is certainly at hand when government must reconsider its position. The declared objective of the National Labor Relations Act is to diminish the causes of labor dispute. Either because of defects in the law, or in its administration, or both, there has been produced a result contrary to the end sought."

JOSEPH C. O'MAHONEY
U. S. Senator from Wyoming.

"If a regulatory law depends for its effect on active policing, it is likely to be a nullity."

RICHARD L. NEUBERGER
Writing in Survey Graphic.

"Today Seattle has more electric kitchen ranges than any other city in the world regardless of size."

MERLE THORPE
Editor, Nation's Business.

"Washington is moving surely into state capitalism that marks the totalitarian countries of Europe."

EDITORIAL STATEMENT
Public Utilities Association Reporter.

"Next to food, shelter, and clothing, transportation is the most essential need of the average worker."

WILLIAM O. DOUGLAS
Chairman, Securities and Exchange Commission.

"There is no reason why the heat of controversy cannot be taken out of the business-government relationship."

FRANKLIN D. ROOSEVELT

"It is only the unthinking conservatives who rejoice when a social or economic reform fails to be 100 per cent successful."

ALF M. LANDON
Former Governor of Kansas.

"It is just as important to national defense to be on a sound financial basis as it is to be on a sound military and naval basis."

CHARLES R. HOOK
President, American Rolling Mill Company.

"Far-sighted, efficient, and socially conscious management asks for no blank check on the bank of individual and corporate freedom."

From a National Emergency Council Bulletin on Grand Coulee.

"When completed, the dam will be three times the volume of the Boulder dam, and will occupy more space than the entire population of the United States."

P. F. BROWN
Plant Engineer, Indiana Bell Telephone Company.

"It [rural electrification] is just a baby elephant growing up, still having a trunk, tail, and the same shaped body. However, because it is growing up and developing a couple of tusks, rural electrification has caused us some real problems and sleepless nights, in so far as structural coördination and the increased inductive influence is concerned."

WENDELL L. WILLKIE
President, Commonwealth & Southern Corporation.

"From one who has fought as an idealistic young man to protect the liberties of the people against the domination of big business which was pouring money into government, now I am fighting to protect civil liberties of business men against the onslaughts of . . . a government which is pouring in money to dominate courts, legislatures, and industry."

Quiet, vibrationless operation is characteristic of the C-E RAYMOND BOWL MILL

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Why all this emphasis on "quietness?" Simply for this reason. Silence is more significantly eloquent in machines than in men, especially in machines like pulverizers. Eloquent of fine design and construction—of balance—of smooth, vibrationless operation—of absence of wearing, metal-to-metal contact. It promises long life—trouble-free operation—low maintenance.

However, the fact that a machine is entitled to first ranking on any one characteristic, even so significant a one as quietness, is not necessarily a criterion that it is the best machine of its kind. In the case of pulverizers, there are the commonly accepted measures of performance—reliability, power consumption, maintenance, capacity and fineness—and there are also special advantages. The Bowl Mill has conclusively proved in service not only that it assures excellent results with respect to *all* the usual measures of good pulverizer performance but also that it possesses such special advantages as quiet, vibrationless operation, ability to handle high temperature air, positive lubrication and convenience of adjustment and control. For these reasons, it is being widely characterized today as the best pulverizer ever developed.

A-433

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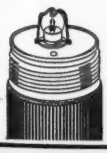

Guard wire holds lamp in spring-loaded socket. Should bulb break, spring ejects lamp-base, instantly opening electric circuit and thrusting hot filament against chilling guard wire.

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In this latest product you will find the sound engineering and precision manufacture that is well-known to all users of TracTracTors—*plus advanced design, many patented features and improvements.* The flexible adaptability of the TD-18, with its 6 forward and 2 reverse speeds, will be a surprise, whatever your experience up to this time.

Equipment especially designed for use with the TD-18 includes SCRAPERS, BULLDOZERS, BULLGRADERS, ROAD GRADERS, WAGONS, SNOW PLOWS, WINCHES, LOGGING ARCHES. Company-owned branches and International industrial power dealers will tell you all about the features of the International TD-18 TracTracTor.

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(Incorporated)

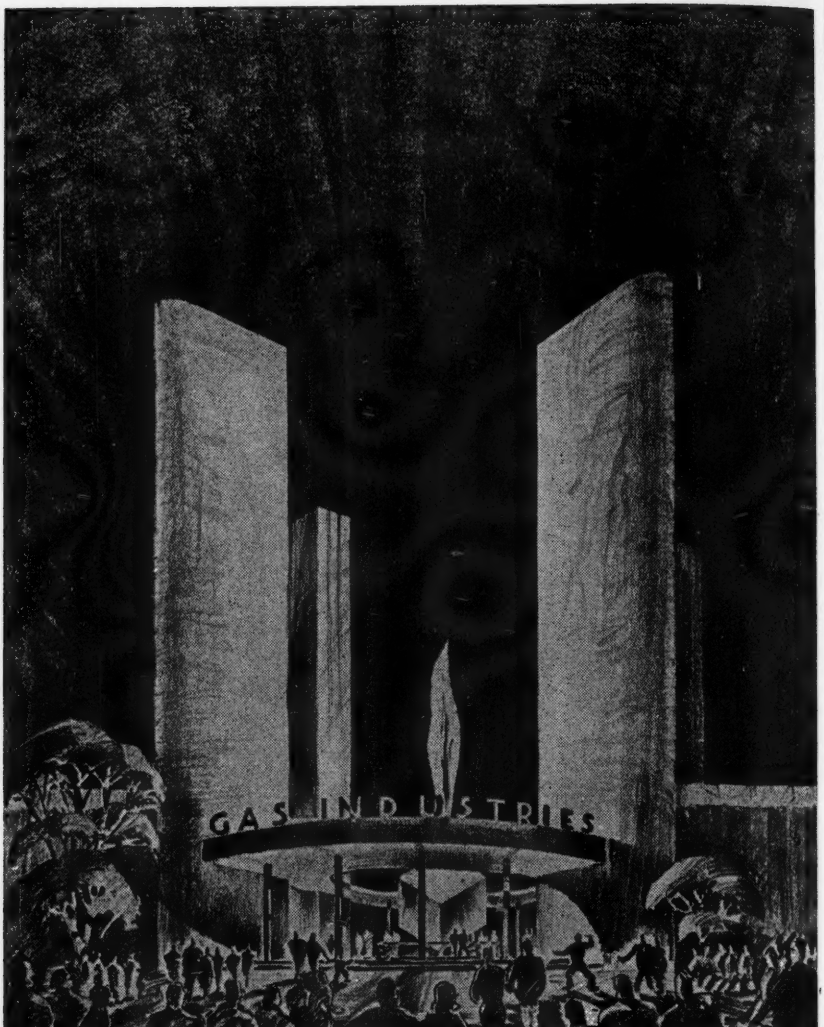
180 North Michigan Avenue, Chicago, Illinois

INTERNATIONAL HARVESTER

Utilities Almanack

MARCH

2	T^{h}	¶ *American Gas Association Eastern Natural Gas Regional Sales Conference of Commercial Section begins, Pittsburgh, Pa., 1939.*
3	F	¶ *American Transit Association, Executive Committee of Operating Association, concludes regional meeting, Washington, D. C., 1939.*
4	S^{a}	¶ *Southern Gas Association will hold annual convention, S. S. Rotterdam, New Orleans to Havana and return, March 19–23, 1939.*
5	S	¶ *Oklahoma Utilities Association will hold session, Tulsa, Okla., March 20, 21, 1939.*
6	M	¶ *American Society for Testing Materials opens spring group meeting, Columbus, Ohio, 1939.*
7	T^{u}	¶ *Edison Electric Institute will hold annual sales conference, Chicago, Ill., March 20–24, 1939.*
8	W	¶ *Texas Telephone Association will hold convention, Dallas, Tex., March 22–24, 1939.*
9	T^{h}	¶ *National Rivers and Harbors Congress will convene for session, Washington, D. C., March 23, 24, 1939.*
10	F	¶ *Edison Electric Institute, will convene for power sales conference, Chicago, Ill., March 24, 1939.*
11	S^{a}	¶ *Association of Iron and Steel Engineers will hold spring conference, Birmingham, Ala., March 27, 28, 1939.*
12	S	¶ *American Gas Association will hold conference on industrial gas sales, Cleveland, Ohio, March 27, 28, 1939.*
13	M	¶ *Wisconsin Utilities Association will hold joint convention of Technical and Commercial Divisions of Gas Section, Milwaukee, Wis., 1939.*
14	T^{u}	¶ *American Railway Engineering Association starts annual meeting, Chicago, Ill., 1939.*
15	W	¶ *Southeastern Electric Exchange will hold convention, St, Augustine, Fla., March 30, 31, 1939.*



"Court of Flame"

Design for the main entrance way to the gas industry's exhibit for the New York World's Fair of 1939, which will present to the public the romance of gas and how it affects and enriches the national life.

Public Utilities

FORTNIGHTLY

VOL. XXIII; No. 5 MARCH 2, 1939

National Defense and The Utilities

When the Federal administration announced sometime ago that it was concerned over possible shortage or lack of coördination in the electric power reserves in the event of a national emergency, cynical observers were wondering whether there might follow another drive against the private utility industries under cover of national defense. This author has analyzed the situation to date with that thought in mind.

BY HERBERT COREY

WHAT will happen to the utilities in this national defense plan? I think nothing will happen to them. To put it differently, I think that nothing but good will happen to them. I believe they have been promised peace and friendship. I think they will do all that will be asked of them, or has been asked of them, because they will see that what is asked is eminently reasonable. I have been given the most explicit assurances of the government's good will. I believe what I have been told.

"Lord, help Thou mine unbelief."

That is not a nice way to talk, I know. I *do* believe, sincerely and honestly, that key men in the utilities have been given assurances by men in a position to speak for the government and that with two important exceptions these assurances have been accepted. I believe the position of the administration has been perfectly fair and honorable throughout these negotiations and that while it is too much to expect that the best politician in the United States—meaning Franklin D. Roosevelt—is blind to the political advantage of a very considerable ex-

penditure of utility money, I also believe that what is nearer his heart is the problem of national defense and that he is too much of a patriot to impede the progress of the defense program by resuming his feud with the utilities. But I cannot forget that Mr. Roosevelt has compared himself to a quarterback in a hotly contested game.

Except that sometimes he seems to be running for one goal and sometimes for the other.

This seems to be the fact.

THE utilities have examined the part they will be expected to play in the national defense program. They are satisfied with it. They have been assured that there will be no further legislative attack made on them with the sanction of the administration. An occasional raid by some congressional enthusiast might take place, but without administrative support would come to nothing. They have been promised that no effort will be made to jam any new nostrum down their throats. They have been promised that while the administration proposes to enforce the laws now on the books, through the FPC and the SEC and other executive agencies, the enforcement will be fair and just.

The government proposes to look the situation over carefully, with the aid of the utilities, and to suggest that changes be made in the operating setup where they are necessary. Much of this preliminary work of exploration has been done in the eastern manufacturing area, which is the part of the country which interests the administration as part of the defense program now under consideration. Only two regions of this area have been found to be definitely underpowered, if a national emergency were to develop tomorrow. In consideration of the promised peace, the government suggests that the utilities can well afford to make what improvements and additions are necessary.

"You have been telling us," the government has said in effect, "that if good relations were reëstablished between the industry and the administration you would have no difficulty in getting all the money you need in the open market. Now let's see you get it and go to work."

IF an operating company is either unable or unwilling to make the changes desired, there is—no doubt about this—the definite suggestion that the government will step in and make them at its own cost. But it is represented that the government does not wish to do anything of the sort. It prefers to keep out of the finances of the utilities. The statement has been made that any utility which needs money for building or modernizing can get it from the RFC. But the administration is definitely not putting any pressure on either side to such a proposed contract. The position of the RFC, as stated by an official, is that it stands ready:

"To loan money to a utility in need if the security offered seems good.

"But we ask good security."

This is supported by a statement credited to an official of the RFC in a Washington dispatch in *The New York Times*. The report had been current that the RFC would loan money to the Nebraska "little TVA's" for the purchase of privately owned power companies, without which it seems

apparent that the publicly owned districts will not be successful financially:

"We are no Quixotes here," said this official. "We do not propose to lend money to support social experiments."

ONLY two or three utilities have opened negotiations with the RFC and, at the time of writing, these negotiations have come to nothing. It is assumed that they will result in loans, for the utility security is presumably good. But the examination by the RFC has been tedious and painstaking and certainly does not support any theory that there are any Santa Clauses on the premises.

The administration wishes the utility operating companies in the eastern manufacturing area thoroughly interconnected. It proposes to see that this is done eventually. Where these connections can be made to the advantage of the utilities concerned, they will be asked to support the cost. Where the connections are primarily to be considered as precautions against such a national emergency as war, the government will make these connections at its own cost. In this way the national "grid" system will be created, somewhat along the lines developed in some other countries. But the government does not propose to interfere in the financial set-up of the companies. If holding companies are found which are in conflict with the SEC statutes and regulations, they must get out of their tangle the best way they can.

THAT is the rough outline of the understanding between the government and the key men of the utilities, as it has been told to me. I will repeat that I believe what I have been told. I am convinced of the bona fides of the negotiators on both sides, although there is no doubt that differences of opinion will arise from time to time. So far as I have been able to discover nothing unreasonable is being asked of the utilities and in compensation they have been assured of future peace and coöperation. I am told that the "starry-eyed boys" who have been galloping through the White House corridors with new and ever newer plans for capturing the entire utility industry have been losing ground steadily. This may not be true, but in view of what has happened in the past it is not incredible. But this must be admitted:

The prospect for peace is so bright and sunny that it is hard to believe.

❦

¶ "THE *attack being made on the utilities by the administration in the past six years had as one result a chilling of the money market toward them. A wise investor would not put his funds into a business which was subject to attack by the national administration, and which if Congress proved amenable might be Norrisized or Ickesed out of independent existence. Competent advisers warned against imposing on the Treasury the costly task of bringing the utilities up to the desired level of efficiency, as stated by the National Defense Committee.*"

And there are utility men who preserve such a lively memory of the methods used by the New Deal in the past six years that they not only do not trust any promises which might be made today, but would manifest a lively distrust of anyone who does believe them. That is one difficulty of the present situation, as I see it. Assuming that the principal negotiators on both sides are disposed to meet in amity, it is impossible for either to be blind to the fact that the administration is being interfered with by its own friends of the Left Wing and that the key men of the utilities must deal with men of the industry who cannot forget the treatment they have been receiving.

NEVERTHELESS, it seems to me that an evidence of the—shall we say suave?—attitude of the administration toward the utilities is to be found in the negotiations which ended in the TVA-Commonwealth & Southern settlement. It is not possible for the outsider to say whether the approximately $80,000,000 the Commonwealth & Southern will realize for its Tennessee properties in fact represents their going value. It is not likely that any agreement will ever be reached on this. But these two facts stand to the eye:

FIRST. Wendell Willkie got at least an approximately fair deal for the investors in his company. That is what he has been fighting for. It is not probable that Mr. Willkie, an eminently realistic man, ever believed he could defeat the power of the government if the New Deal ever determined to take over the Tennessee valley properties. He resisted the intrusion of the government on legal and constitutional grounds as long as possible. But he would have surrendered long ago if the New Deal had been prepared to play and pay fair. He offered time and again to accept a price fixed by the SEC, itself a part of the government.

SECOND. It is evident that the burn-and-slay advocates, headed by David Lilienthal and Senator George W. Norris, sustained a defeat when the government's terms were made known. They have been the leaders of the "scorched earth" policy. They proposed to take over the TEP's properties at whatever price could be fixed, no matter how low that price might be. None of the press columnists is more warmly pro-New Deal than is Ernest K. Lindley. He is usually referred to by his admirers as a personal friend of the President's, and the low-descending sun usually discovers one of Mr. Lindley's defensive bouquets on the steps of Mr. Roosevelt's temple. But even so completely satisfied a New Deal adherent had this to say of the TVA negotiations:

"They (the Commonwealth & Southern) have obtained an agreement to dispose of the poor territory with the rich. At one time TVA seemed intent on skimming the cream."

When the National Defense Committee held its first meetings there was reason to believe that the New Deal proposed to force the utilities to take orders. It may be that the fear then expressed that the plan involved a seizure of control of the major companies from coast to coast was not wholly justified. A good deal of loose talk was indulged in on both sides in those days. But it is certain that the

Interconnection of Utility Companies

"THE administration wishes the utility operating companies in the eastern manufacturing area thoroughly interconnected. It proposes to see that this is done eventually. Where these connections can be made to the advantage of the utilities concerned they will be asked to support the cost. Where the connections are primarily to be considered as precautions against such a national emergency as war, the government will make these connections at its own cost."

fear was genuine. The Lilienthal-Norris - Corcoran - Cohen camorra seemed to have the presidential ear. The plan which the administration was reported to favor was being advanced under a cloak of patriotism:

"You must do as we tell you," the utilities were told. "The country's safety may be at stake."

ONE of the two key men who held out for fair play at this time was —unless my information is in error— Wendell L. Willkie. He is reported to have said in effect:

"The Commonwealth & Southern can render just as efficient service to the government in its present form as it could if it were taken over by the government. It could, in fact, render better service than if it were turned over to untried men."

An agreement seems to have been reached about this time. At all events it was before the Supreme Court handed down its decision that I was told that:

"Mr. Willkie is meeting us in the most cordial fashion possible. He is very coöperative. We owe him a great deal for the aid he is giving the national plan of defense."

Then the Supreme Court ruled that the government had every right to compete with privately owned companies of any kind. It declined to pass on the question of TVA constitutionality, adhering to its rule of long standing that it will not pass on the constitutionality of an act of Congress unless the contestant is able to show a vital interest, and it refused to accept the 19 protesting utility companies as possessed of that interest. Only a state, apparently, can now bring action before the court on such ground. The defeat of the utilities was an overwhelming one.

THE government might have taken advantage of its position and scooped up the C&S properties at its own price. This fact may be accepted. The "scorched earth" operators had

let it be known that if they did not get these properties they would parallel the lines and drive the privately owned companies out of business. Congress might not have looked on this with complete approval, but the TVA still had the authority to issue bonds to a total sum which would make this plan possible. Never in the history of the TVA controversy has any generosity been shown by the Lilienthal-Norris group. Yet contrary to what might have been expected, an offer was made and accepted which seems to have been satisfactory.

If the administration had not decided upon the appeasement of the utilities, this offer—in my opinion—would not have been made.

Yet it is again necessary to temper this conclusion with a word of caution. At the moment of writing this attitude is being honestly held. No one can underwrite tomorrow's moment.

To get back to the program for national defense.

No one thinks that we will be involved in another world war immediately. No one in authority in Washington, so far as I have been able to discover, thinks there will be another world war until an indefinite period has passed. But it is not so many weeks ago that it seemed to these same authorities that there was a very excellent chance that the nations of the world would be in the gutter again, biting and snarling, in a very short time. Apart from the political reasons with which everyone is familiar, the fundamental reason for this fear was that Germany has stepped up her production of planes to 12,000 a year on one shift a day.

If she could work two or three shifts, and supply the new planes with pilots and mechanics and ground forces, she would be irresistible.

She has worked out a new theory of war. Instead of plodding slowly overground she now proposes to raid from the air. Wave after wave of fast bombing planes could be sent over London and Paris, protected by her fast pursuit planes. One of her new pursuit planes is credited with a 400-miles-an-hour ability. It hasn't got it, but never mind that. The air experts thought it had not so long ago. Cities cannot be taken or held by the air arm, but they can be rendered untenable. If the opposition could be driven out of the air, London and Paris would be mere fat pigeons for the German hawk. Antiaircraft guns make pretty noises, but they do not bring down many planes. German pilots are being trained to bomb at cities rather than at such smaller bull's eyes as factories and railroad stations. If the heart of a nation could be broken from the air, her forces on the ground would be useless.

This may seem incredible, I'll admit. It may sound like the ravings of John McCullough, as we old timers used to hear them on the penny phonographs. But that was the fear which chilled official hearts in Washington not so many weeks ago. No one knew precisely what part we might be called on to play, then or later, but it was accepted as a fact that if this Welsh-rabbit dream of German conquest came true, we would be in trouble up to our necks very soon thereafter. And there was the horrendous fear that the dream might come true. It was known that the air arms of Great

Britain and France were incredibly weak. Both countries had entered into contracts with American manufacturers of planes and were trying their muddled best to go to building on their own. The truth is that they were not getting much of anywhere at home. Before this article is printed some of the truth may have been made known to the world, for there are indications that the administration will tell the whole story. Perhaps under pressure, it is true. Still it may be told. Great Britain and France not many weeks ago were outdoing their own best records for fumbling.

If we were compelled to put ourselves in a defensive position, no matter what might happen to Great Britain and France, we were at this time facing the certainty that we would fumble on our own side. It may be remembered that we can almost out-fumble any one when we start. See the history of our early participation in the World War. The administration realized that if we were called on to make a tremendous effort, almost the first thing we would need would be an abundance of electrical power. The National Defense Committee—it has several manifestations under various names—was set up. Experts were called in from the FPC and the FTC and the utilities.

LET me emphasize at this point what I believe to be the truth.

This inquiry was not prompted by or shaped by any political ambition.

If the utilities could be persuaded to spend one billion dollars for extensions, etc., in the next year—the sum mentioned is the one they have themselves used—much would be done in furthering recovery. The Lord knows we need recovery. Recovery would be of immense political value to the New Deal. All this is axiomatic. But apart from the unquestionable politics of the situation, I believe it to be the truth that the administration feared that the supply of electrical power available would not be sufficient to meet the sudden emergency of war or of forced preparation for war. The administration and its advisers were compelled to examine the situation factually. This statement was made to me by authority:

When the armistice was signed in 1918 our electrical production was proving unequal to the demands being made on it.

A greatly expanded increase in 1939 —due to the greater mechanization of all military forces—would have resulted in an abominable tangle.

THE attack being made on the utilities by the administration in the

¶ "IF *holding companies have erected structures which the SEC does not look on with favor, they can get themselves out of that tangle the best way they can. There are at present two factions in the SEC. One definitely favors fair treatment for the holding companies, plus a generous allowance of time for action, and the other continues to be hostile. In any event it is the plan that operating companies shall not be unduly embarrassed at this time.*"

past six years had as one result a chilling of the money market toward them. A wise investor would not put his funds into a business which was subject to attack by the national administration, and which if Congress proved amenable might be Norrisized or Ickesed out of independent existence. Competent advisers warned against imposing on the Treasury the costly task of bringing the utilities up to the desired level of efficiency, as stated by the National Defense Committee. This could only be done by using investor money. Only in this way, too, could the outgo of tax money be stopped and an in-go of tax money started again.

I think there is no doubt that at the beginning of the national defense program, there was a determination on the part of the administration to issue orders to the utilities. They were to be told in dictatorial fashion what they must do. Back of the order was the implied threat that they might be taken over in part or that control might be in part seized. The successful fashion in which the hydroelectric program and the public ownership program had been put over, had gone somewhat to the administration's head. Then—so I believe—the painful discovery was made that unless the utilities coöperated candidly and willingly, it would not be possible to make the betterments desired.

THEREFORE, it was determined to make peace with the utilities.

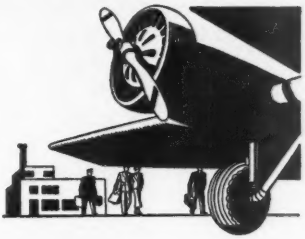
They were willing. They have never asked anything better than peace with the administration. They asked for certain assurances and—so I am told on authority that I believe fully—they were given those assurances.

The administration learned that if the betterments to be demanded of the utilities were to be planned and built by the government—which is the implication of the plan which looked toward governmental control and bureaucratic management—that the most gigantic flop on record would be the result. The operating companies know their business. They know what they need and what they might like to have and what can be done by interconnection to make the present facilities more useful. But if a swarm of government men came in, no matter how good they might be, time would be lost in education and inquiry and blue-printing and by that time the war might be lost, if there were a war.

The administration has believed that the huge hydroelectric projects on which so many million dollars have been spent would be of immediate value in the event of a war-strain on production capacity.

IT was discovered that these projects would be useless, broadly speaking. Their generators are too far away from raw materials and manufactories.

The TVA probably would be the most useful of the lot. In the Tennessee valley there are various raw materials available, and the chemicals needed in war could be manufactured successfully. But the immediate need would be useful current in the manufactories of the East and the TVA could supply only a comparatively small amount, because of the present lack of high-power transmission lines. The construction of such lines would be merely an added handicap, if a sudden emergency were to arise. The western hydroelectrics would prove to be mere nuisances in war-time. They have been so thor-



Plane Production in Germany

"GERMANY has stepped up her production of planes to 12,000 a year on one shift a day. If she could work two or three shifts, and supply the new planes with pilots and mechanics and ground forces, she would be irresistible. She has worked out a new theory of war. Instead of plodding slowly overground she now proposes to raid from the air. Wave after wave of fast bombing planes could be sent over London and Paris . . ."

oughly advertised that if there were an electrical shortage in the manufacturing areas a popular demand would arise that they be set to work and would probably prove irresistible. Thousands of men and millions of money would be diverted from more immediate and important tasks.

The plan as adopted, therefore, seems to have two significant factors.

The first is that peace has been made with the utilities. This statement is subject to the qualifications previously stated. Peace would be of great political importance. It would encourage recovery, which is likewise of political importance. It would relieve the Treasury from the danger that it might be called on to provide huge sums for the betterments desired. It would increase the tax revenue.

THE second factor is that a grid covering the eastern manufacturing area primarily, and perhaps to be expanded later, would be created. This proposition takes operating companies only into consideration. If holding companies have erected structures which the SEC does not look on with favor, they can get themselves out of that tangle the best way they can. There are at present two factions in the SEC. One definitely favors fair treatment for the holding companies, plus a generous allowance of time for action, and the other continues to be hostile. In any event it is the plan that operating companies shall not be unduly embarrassed at this time. So I am told.

There are instances where intrastate operating companies will find it so much to their advantage to construct connecting links that they can afford to do so at their own cost. It is the present presumption that they will do so. There are other cases which do not offer the same advantages to operating

companies in the same or contiguous territory. In such cases the links will—if necessary—be built at the cost of the government. The money presumably will be furnished through the RFC or some other Federal agency. There are 22 such agencies which now have authority to issue securities on which money can be borrowed. About half of them have Treasury backing.

An obstacle was discovered in the interstate commerce laws to the connecting of companies operating on two sides of a state line. But this has been surmounted by a very simple device. Rather than revamp the companies so that their operations in an interstate grid would comply with all the laws and all the regulations, the Federal government proposes to build the links which shall afford connection across state lines at its own cost. So far as this plan has been worked out at present these are to be for emergency purposes only. In ordinary times the operating companies could conduct their affairs as at present, but, in the event of an emergency, the Federal government would direct that they be hooked up. It is probable that this plan will in the end permit the use of these interstate links for the ordinary purposes of business, but this phase had not been examined at the time of writing. It is merely in contemplation for the future.

By this means the entire eastern manufacturing area could be protected against a failure of power in any part. The usual phrase is, "if one city were bombed and its power cut off," but no one really anticipates anything of the kind as a possibility. What might be possible, if we were drawn into an international conflict, even if we were not compelled to use our naval or military power, is that home-raised bombers might set their infernal machines in our powerhouses. This is regarded as a very real possibility, for a few crackpots with a few pounds of explosive could do an immense amount of damage. The recent bomb explosions in England produced a real effect on authority here. The bombs set off in England did little damage, and it was assumed that the bombers planned to produce a political effect only. But they were an evidence, if one were needed, of the injury that could be done by hostile domestic forces.

There is another side to the picture, of course. There usually is.

No one suggests that President Roosevelt has changed his attitude of antagonism to the utilities. He has been consistent in that from the beginning of his administration and for years previously. But it is reasonable to suppose that two things have shaped the more recent development of that attitude. With the building of the public power plants on the great rivers, much of the political value has been squeezed out of his public ownership program. The voters who agreed with him, possibly without taking much thought, in his assertion that water power was a national resource and should be developed by and for the people, are not convinced that it is good business to destroy tax-paying companies which have been in efficient operation for years. An evidence of this is that although Mr. Ickes has been giving 55 per cent of the cost of municipal plants from the Federal Treasury and making handsome loans against the balance, many towns

and cities have not accepted the handout. Mr. Ickes has prepared a bill which provides for the continuance of the PWA with its gift program, but it is by no means certain that Congress will make it a law, and this in face of the fact that Mr. Ickes dangles at least one possible project as bait in each congressional district.

THE second fact which has undoubtedly shaped Mr. Roosevelt's present attitude is that the utility problem is more complicated than it appeared to him to be in his first days of lush enthusiasm, when he found a yardstick at every waterfall. Then he listened gladly to enthusiasts who would make a new heaven and a new earth over night. Those with long memories will be able to recall how many of them came to Washington, were accepted as presidential intimates, and later went whirling out on their ears.

Something of the same may have taken place recently. Thomas Corcoran, author of many a bright idea, has been sitting in at meetings of the National Defense Committee as a representative of the RFC, but he has had almost nothing to say. Secretary Ickes, likewise a member, has maintained his usual acidity, but he is said not to have interfered with the practical workings of the plan. He has, in fact, been helpful in several instances.

The fact is, as reported to me by what I accept as competent authority, that the President will not permit anything to interfere with the building up of electrical production as needed for the defense program. He has been gratified by the willingness of the industry to coöperate.

IT is not here suggested that there will be any interference with the operations of the Rural Electrification Administration, which has invaded the territory of many western utilities. A state which consents to give to the Federal government control of lands and water power—as Vermont recently refused to do—will be a recipient of bounty under the existing statutes. But I am assured that the national defense plan is very near Mr. Roosevelt's heart—politics and all—and that, in order that it shall be fully developed, he is willing to make peace.

Unless I have been wholly misinformed, the key men of the utility industry have met him cordially. Out of this present understanding good may come for the future.

The Road to Recovery

"CONGRESS should refuse absolutely to appropriate any more money for the purpose of putting the government in competition with private enterprise. It should find a way to establish peace with the utilities. It should refuse to finance any further investigations designed solely to harass, embarrass, and intimidate business. It should make any reasonable tax adjustments which promise to increase prosperity. Business recently has indicated a desire to go along with government and government should hasten to embrace this unusual opportunity to emerge from the indefensible position against business into which it has gotten itself."

—ARTHUR P. LAMNECK,
Former U. S. Representative from Ohio.

The Spreading Power Demand In the Middle Southwest

With the coöperatives feverishly at work expanding the network of transmission lines with the interconnecting private lines, and the tying in with government projects, this vast section of the country, says the author, is in the throes of a great electric development.

By OLAF D. BAKER

NORTH and south through the Ozark mountains of central Missouri, central Arkansas, and Louisiana are streams of immense potential water power.

Already a maze of wires has brought cities and towns of this middle section to steam and hydroelectric generating plants built and operated by private utilities. Summer playgrounds in the Ozarks, industries, and REA projects are also being served.

On each side of these pioneer private utilities is a government utility project. In northeast Oklahoma, just over the west line of Missouri and Arkansas, and only a short distance from the center of population of the United States, the Grand river dam, a government project, is being built. Within five hundred miles, we are told, are more than ten million people. The great tristate lead and zinc mining district and rich oil wells are within the circle.

To the east across Missouri or Arkansas and to eastern Tennessee is the TVA with a western reach to the Ozarks where a recent contract has been signed with the Tennessee Valley Authority under which TVA power will flow through the Arkansas Power & Light lines. With power already available from the great Arkansas Power & Light Company's interconnected system, this is a forward step in the growth of the country.

The questions generally asked are: "Will this Middle Southwest with its present wide spread of service eventually become a great network of all hydroelectric companies of this section, stretching out like the delicate nerve

system of the human body to meet the human needs? And what is being done about it?"

BEFORE electric power is employed to great social ends we must have some idea of what the transformation might be. There is the vision of transporting hordes of people from unhealthy slums to places where they can live decently, breathe good air, see the open sky while they work at industries developed where the raw materials are because of cheap and dependable power.

Within the reach of the Middle Southwest's unseen ocean of power are fertile fields of wheat and corn to the cotton fields of the South.

Oil development and refineries, mines, asphalt plants, cotton gins, irrigation plants, cotton oil mills, railroad shops, lumber mills, lime plants, marble quarries, textile mills, canneries, and many other industries turning raw materials into marketable products have already been developed in this territory, while by far the greater number of farm homes have no electric lights or power and the vast amount of raw materials is yet to be converted into salable products.

Across Missouri, east and west, runs the great coast-to-coast highway into which pours the north, northeast, and eastern traffic in a continuous stream of cars which pass over the Neosho bridge, Miami, Oklahoma, at the head of the Grand river dam lake now under construction. Will the network of lines eventually light this Main Street of America and other main highways?

THE Middle Southwest is becoming power conscious, made so largely by the pioneer private utilities. Take, for example, the intensive sales and promotional efforts of the Arkansas Power & Light Company toward a more complete farm electrification. The company has, from the very beginning of its extension of service to rural areas, maintained an active farm electrification division in addition to the general sales promotion staff which covers farm business as well as others.

The company has surveyed all farms in the territory and ascertained the condition of electrical equipment of present farm users. Its representatives continuously assist in instructing customers in proper use of equipment and inform them as to reasonable operating costs. The company has at all times coöperated with agricultural and demonstration agents in connection with county and state exhibits, agricultural station experiments, etc. It has maintained close contact and coöperated with governmental and public activities relating to agricultural developments.

The sales and promotional efforts of the company, relative to farm electrification, have been carried on in accordance with definite long - range planned programs. The company even goes so far as to study the farmer's condition, to supply him with information on improved methods of farm operation, and to aid him to find new and enlarged markets for his products, so as to make it possible for him to have electric service. Thus, more power lines are needed to meet social ends.

IN a part of the Ozarks, rural electrification is primarily an economic rather than an engineering problem. Many of the people concerned have an extremely low monthly income per

family, only a few of whom can afford to make the investment in major appliances for farm use. The sparsely settled farming territory creates an additional burden of insufficient revenue for operation, maintenance, and overhead of rural lines.

Rural electrification, a problem of great social significance, is best studied from sections where rural lines have been in operation long enough to permit conclusions as to sales and revenues that may be reasonably expected, and as to minimum operating and maintenance expenses that will be incurred.

Faulkner county, Arkansas, is an example of the problems to be considered and of results to be expected from a rural electrification program within parts of this Middle Southwest area where the farmers are not so wealthy as in many sections but where many of them can become customers at a small monthly outlay, if provided financial assistance for buying electrical appliances and wiring their premises.

The following is taken largely from a report of Faulkner county made by the Arkansas Power & Light Company. The country electrified is rolling with low hills and wide shallow valleys. It is wooded, but most of the land is or has been under cultivation. The soil is sandy and not very fertile, as much of the top soil has been washed into the valleys. The valleys are fertile and productive. However, there exists in the Middle Southwest, in contrast to the hill land, prairies and bottom lands with different problems.

The resources of the company have been applied to connect the customers available to various lines and to promote the greatest possible utilization of the service by customers consistent with their respective needs and ability to pay. The customers are served under the company's standard rate for rural electric service which is available everywhere in the territory served.

Prospective customers under the plan were allowed to furnish labor and other services in construction for which they were paid prevailing prices. This enabled a large number of prospects to pay for their house wiring and meter deposits. Customers were also assisted in obtaining appliances and house wiring at the lowest possible costs.

The new type low-cost line in conjunction with a low-cost transformer developed for serving rural territory is now being used throughout the country.

FAULKNER county is served on a "planned area basis," with lines which follow all the main highways

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and some of the better country roads. It has also been extended into areas adjacent to such roads and highways wherever density of customers is three to the mile or better.

Ninety-one and seven tenths miles of 6,900-volt primary line and 11.4 miles lateral secondary lines, a total of 103.1 pole line miles, were built in this county to serve 365 estimated customers. The total cost of the project was $59,740 including transformers and customers' service drops. This report was made after two years of operation.

Three hundred and thirty customers were connected at the end of three months' operation. Most of these customers had paid for their meter deposits and the wiring of their houses by furnishing common labor in construction of the lines. Since then 69 new customers have been connected.

During the first year of operation average sales per average customer served were only 220 kilowatt hours per customer year. The second year of operation, sales increased to 300 kilowatt hours per customer year. An average of 300 kilowatt hours per customer year is only 25 kilowatt hours per month. This is far short of 40 kilowatt hours per month, the number of kilowatt hours included in the $3 minimum of rates approved for use by rural electric coöperative associations in other places. Only 11.5 per cent was for 40 kilowatt hours or more.

THE Arkansas Power & Light Company's rural rate with its minimum charge of $1.25 has been designed to bring service to this low-use average customer and enable him to increase his service in accordance with his ability to pay.

Although each customer was presented an electric iron, the bills were less than the amount considered for lighting service. The rural customers of this county do not use an average of 40 kilowatt hours during even the peak consumption months of the year. In case of the $3 minimum rate they would either have to increase their use of service to absorb the extra kilowatt hours or pay for service they didn't use; or if they cannot pay more than they do at present, their only alternative would be to discontinue service.

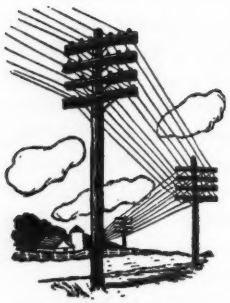
During the second year of operation, all customers served from the Faulkner county rural lines, including commercial, nonfarm residential, and farm customers, used 24 per cent more service than was used during the first year of operation. For this increased use, however, the customer paid only 15 per cent more money. The increased usage, therefore, cost them less than half as much as it did before. This is due in part to rate adjustment and also to the promotional features of the prevailing rates of the company.

Regardless of cause the above shows a constant tendency toward lower rate levels where service is supplied by an established utility which is regulated under the laws of the state which it serves.

The financial results of the Arkansas Power & Light Company's operation of rural lines in Faulkner county showed a deficit of $3,326 before any allowance was made for general overhead expenses or for property retirement and improvement reserve.

AFTER the development period, the company expects the rural customers to learn how to utilize electricity

Nonprofit Coöperatives



"WHILE rural electrification projects are similar in the different states, each area sets up a nonprofit coöperative incorporated under the laws of the state, which borrows money to build power lines and to maintain and operate lines which, when paid for, belong to coöperative members. Each member puts in $5 and gets one share of stock. Each customer must wire his own property, but the coöperative furnishes transformers, meters, lines, and everything up to the house, barn, or yard pole, wherever the service is needed if not more than 1,000 feet."

more fully and make it pay for itself as farmers have done with motor power. The increased use of service per customer already shown is evidence that usage is gradually growing and that the farmers are finding ways to actually make power bring in some money as well as make work easier.

In due time it is possible that increased use of service at prevailing rates by available customers will yield revenues sufficient to cover incremental operating and maintenance expense, and a way to return on money invested in the rural lines together with an adequate reserve for replacing the lines when they are damaged by storm, worn out, or become inadequate for increased service requirements. An improvement in the economic status of rural and farm people is expected to accompany rural electrification as the result of the various activities of farm organizations, state universities, and Federal agencies. Only through such economic improvement, it appears, can the productivity of farms be increased and farm products satisfactorily marketed so as to give the farmers purchasing power substantial enough to allow rural electrification to pay its own way.

SMALL industries to handle raw products are made possible by power service and are helping the farmer to solve his problem of making it pay.

The Arkansas Power & Light Company is prosecuting its rural electrification program with the coöperation of the REA, which is taking the company's bonds at a low rate of interest. Some 1,200 miles of rural lines have already been constructed, extending service to some 5,000 additional farms and other rural establishments. Six of the rural electric coöperatives have contracted with the company's lines for their power. Two of these coöperatives are in operation.

In bringing electrification to the farmer, the first question he asks is, "How much is it going to cost?"

The rates which have been generally approved for use by rural electric coöperatives have been subject to variations made necessary by differing local conditions. In general they are based on a minimum monthly charge which will

guarantee sufficient revenue for operating expenses during the load-building period.

Depending on local conditions, the minimum monthly bill which each customer will have to pay will normally be between $2.50 and $3.75, which includes 40 to 50 kilowatt hours of energy.

MISSOURI, with its towns, cities, playgrounds, and many industries served with electricity from its several hydro plants, is planning an extensive network of rural transmission lines.

While rural electrification projects are similar in the different states, each area sets up a nonprofit coöperative incorporated under the laws of the state, which borrows money to build power lines and to maintain and operate lines which, when paid for, belong to coöperative members. Each member puts in $5 and gets one share of stock. Each customer must wire his own property, but the coöperative furnishes transformers, meters, lines, and everything up to the house, barn, or yard pole, wherever the service is needed, if not more than 1,000 feet. If the customer is more than 1,000 feet from the main line, he is asked to pay the actual cost of building line beyond 1,000 feet. The price is about 12 cents per foot.

There are seventeen projects in the state of Missouri and as many as four counties to a project. Here better economic conditions are found. Throughout these counties steps have been, and are being, taken to give the farmers rural electrification under the coöperative plan.

This spread of the nonprofit transmission lines, built and operated by money secured from the REA at 2.88 per cent interest, to be paid back in twenty years, is bringing to rural districts new industries which are increasing the use of electricity. As the amount of used electricity increases, the rate decreases. Minimum is from $3 to $3.50 for 40 kilowatt hours. After 40 kilowatt hours are used, the rates usually drop to 4 cents or 4½ cents per kilowatt hour, ending with 2 cents down to 1½ cents for all over 200 hours a month.

The figures used are from the electric coöperative operating in Lawrence, Green, Dade, and Polk counties of Missouri with offices in the courthouse at Mount Vernon, Missouri. The Ozark Electric Coöperative is buying power from the Empire District Electric.

THE people of northeast Oklahoma are awake to the economic advantages of electricity and are preparing to spread a network of power lines which will penetrate the rural sections of practically every county in northeast Oklahoma. Instead of waiting until the Grand river dam and power plant is completed and then waiting three years to get a coöperative going as some have done, the people of the GRD district have already visioned the steady glow of electric lights in hundreds of Grand-omain farm homes now lighted with lamps and have already made advances toward reality.

Dozens of meetings in rural communities have been held by directors of the recently formed Oklahoma Electric Coöperative Association fostered by the GRD Authority as a part of its program in marketing the 325,000,000 kilowatt hours of electric power to be available in 1940 from the dams along Grand river.

¶ *"In a part of the Ozarks, rural electrification is primarily an economic rather than an engineering problem. Many of the people concerned have an extremely low monthly income per family, only a few of whom can afford to make the investment in major appliances for farm use. The sparsely settled farming territory creates an additional burden of insufficient revenue for operation, maintenance, and overhead of rural lines."*

Sometime ago, the Rural Electrification Administration allocated $500,000 for building of an initial network of transmission lines in Ottawa, Craig, Delaware, and Mayes counties. Another half million is expected to be available soon for similar electrical development of Tulsa, Muskogee, Okmulgee, and Wagoner counties. The first unit to be launched is planned between Vinita, Okla., and the Grand river dam. The coöperatives are not planning to wait until the GRD is completed but intend to swing into operation by purchasing power from near-by plants.

A power rate of $3.50 per month for 40 kilowatt hours is anticipated, based on potential 2½ subscribers per mile. Should more persons sign up along the course of the feeder lines the rate is expected to be lowered in proportion. The economic condition is much better than in many areas and an increase of used power is expected.

The power quota suggested will allow users ample supply of light, based on normal family usage, and in addition allow the use of various utilities, such as home appliances and electric washing machines.

The GRDA member in charge of the load distribution department reported that REA had reacted favorably to the Authority's plan for an additional $500,000 to supplement the original grant of similar amount.

When plans of the Authority materialize, a network of rural transmission lines will be spread through Ottawa, Craig, Delaware, Mayes, Tulsa, Okmulgee, Muskogee, and Wagoner counties.

The GRDA has recently been urged to widen out on the TVA pattern. The suggestion includes a large-scale development that would weld three dams on Grand river and one on the Illinois into a large-scale power set-up. If the plan is carried out it will be necessary that legislation bring the Illinois river into the scope of GRDA. This would mean an amendment enabling the authority to issue bonds for construction of a dam at Fort Gibson, and the designation of the proposed Tenkiller ferry flood control dam as a hydroelectric project. The board of Army Engineers has been asked to make a report of the potential power possibilities of the various dam sites located in eastern Oklahoma. The Tenkiller ferry dam project has the approval of the U. S. Army Engineers as a flood control project.

With the coöperatives feverishly at work spreading the network of

transmission lines with the interconnecting private lines and the tying in with government projects, the Middle Southwest is in the throes of a great power development.

There is much more to interconnected power systems than just serving power demands during normal times. In nearly every emergency their value has been demonstrated. Not only are interconnected transmission lines a lure for restless factories and industries in peace times, but in times of disaster they become saviors of the moment.

Former President Herbert Hoover, while Secretary of Commerce, asserted that "maintenance of electric service in the flooded areas of Arkansas, Missouri, and Louisiana, is a monument to the advantage and efficiency of interconnection of electric power stations and systems."

Flood control is working its way into the dam projects. The most recent development, and said to be the first in the history of the country, is that the government has gone in with a power company for the building of a combination power and flood control dam.

PLANS are being made by the Arkansas Power & Light Company to go ahead with the construction of the third dam on the Ouachita river in Arkansas. This will be constructed in partnership with the government—Congress having authorized contribution of $2,000,000 toward the $6,000,000 estimated cost of dam and reservoir, providing the Army Engineers approved. The approval has been given. For the $2,000,000 the government will obtain approximately 500,000 acre-feet of storage capacity for control of floods.

The flood storage part of the reservoir will be kept empty, or the water released in accord with instructions from the Army Engineers. The power part will be operated under FPC. By this partnership plan the government will obtain flood storage for $4 per acre foot, whereas the average, as I understand it, is around $17 to $20.

One Hundred and Fifty Uses for Electricity on the Farm

"THERE are more than 150 uses for electricity in agriculture, according to a new circular issued by the College of Agriculture of the University of Kentucky. Electricity may not only provide better lighting, added conveniences, leisure time, and improved living conditions, but it may be a means of increasing the farm income, it was declared.

Here are a few of the uses of electricity on the farm listed in this publication: Lighting, cooking, refrigeration, washing, ironing, operating radio, pumping water, milking cows, cooling milk, separating cream, sterilizing milk utensils, churning, providing cold storage, increasing egg production, hatching eggs, brooding chicks, stimulating the growth of plants and animals, trapping insects, lighting yards and buildings, ringing burglar alarms, heating soil in hotbeds, drying fruits and vegetables, and operating saws, sprayers, feed cutters, threshing machines, and sheep shears.

The Assault on Electric Rates

If it continues to a point where inadequate returns cripple the industry's ability to attract capital, consumers, in the opinion of the author, may be worse off than if they paid a reasonable remuneration for the service.

By LESTER VELIE

SINCE lower power rates comprise a major aim of the Roosevelt administration power policy, it was to be expected that the utility industry would undergo, during the New Deal years, the most searching and widely publicized scrutiny of rate schedules and rate practices in five decades of private utility history.

The fact, then, that the average rate per kilowatt hour of electricity charged to domestic consumers declined 23 per cent from 1932 through 1937 while annual domestic kilowatt-hour consumption was rising 27 per cent, poses these questions: Was the Roosevelt power policy responsible for this downturn in rates and upturn in usage of electricity? Would the industry have cut rates and expanded consumption in any event, without prodding from the administration and from state regulatory bodies that took their cue from Washington? Furthermore—to put the matter of credit for the declines aside for the moment—will continuing pressure on rates render returns inadequate and undermine the industry's ability to attract additional capital?

Government power advocates contend that pressure from Federal "yardstick" projects and from government-financed municipal plants drove rates down. Private utility spokesmen point out that rates have moved continuously downward since the industry's inception and were already declining even when no regulation existed. Let us consider the industry's case first.

Since 1882, when a kilowatt hour cost 25 cents, as indicated in the table below, rates have declined uninterruptedly to reach their present level (end of May, 1938) of 4.32 cents a kilowatt hour:

1882	25	cts. per kw. hr.
1900	17	" " " "
1910	9.62	" " " "
1920	7.45	" " " "
1925	7.3	" " " "
1930	6.03	" " " "
1932	5.57	" " " "
1933	5.49	" " " "
1934	5.30	" " " "
1935	4.99	" " " "
1936	4.65	" " " "
1937	4.39	" " " "
1938	4.32	" " " "

BILLS for domestic service have declined continuously as well. W. G. Vincent, vice president of Pacific Gas and Electric Co., analyzing bills for domestic service in 51 cities used by the Department of Labor in compiling its cost of living data, found that the average bill (weighted according to population) declined as follows:

	AVERAGE BILL FOR		
	25 kw. hr.	*100 kw. hr.*	*250 kw. hr.*
1906	$2.77	$10.29	$24.87
1911	2.43	8.66	21.34
1916	2.08	6.93	16.28
1921	1.99	6.31	14.61
1926	1.80	5.58	12.73
1931	1.65	4.94	10.60
1936	1.50	4.17	7.79
1938	1.40	4.10	7.50

Through three decades, the downtrend of utility rates continued; it spanned two major national crises, the World War period and the 1929-1933 economic disaster. Except for the brief post-war inflation period, the average domestic bill for 25 kilowatt hours and up has been lower than the preceding year's bill. Over the 3-decade period the bills for domestic service have sliced those of preceding years by the following percentages:

For 15 kw. hr.	1.8 per cent
For 25 kw. hr.	2 " "
For 40 kw. hr.	2.3 " "
For 100 kw. hr.	3 " "

For the fifteen years from 1921 to 1936 the percentage of decline from each preceding year has been as follows:

For 15 kw. hr.	1.5 per cent
For 25 kw. hr.	1.8 " "
For 40 kw. hr.	2.1 " "
For 100 kw. hr.	2.7 " "

IT did not take the industry long to discover that the production and distribution of power, and financing this generation and distribution, presented problems markedly different from those in other enterprises. It was learned, for example, that there is a point at which the minimum lighting requirements of a consumer are satisfied and beyond which energy usage begins to decrease; that the consumer is, therefore, willing to pay less and less for additional power.

Utility rate makers chewed on the problem of pushing demand past minimum lighting requirements and solved it by fashioning the promotional rate which not only swelled sales but also permitted the electric utilities to compete with other sources of energy.

For example:

The domestic customer served by the Consumers Power Co. in Michigan pays $1 for his first 20 kilowatt hours, or 5 cents per kilowatt hour. This amount of energy meets the ordinary minimum lighting requirements. For the next block of 30 kilowatt hours, the residential customer pays 4 cents per kilowatt hour, and his total amount of power permits him to meet his lighting needs and to use some small appliances besides. Here the promotional rate enters, and the customer is induced to do his refrigerating and cooking with a 2-cent rate for a block of 150 kilowatts. This rate and the subsequent 1½-cent-per-kilowatt-hour rate for all excess power usage, it can be seen, permits the electric utility to compete with gas and other fuels.

THIS competition from gas and other sources furnished a yardstick for values in the electric utility industry long before Franklin D. Roosevelt propounded his "birch-rod-in-the-cupboard" power projects with which to whip private utility rates into line. But while the promotional or com-

petitive rate constituted the first factor in starting private utility rates downward, there were three others, and their influence, as we shall see, is by no means over as far as rate schedules are concerned. These three factors are:

1. Increase in size and diversity of lead which resulted in cheaper utilization of existing facilities.

2. Technologic advances which increased operating efficiency by the development of higher pressure turbines, standard design in substations and distribution systems.

3. Consolidation of properties which permitted customers of isolated independent plants, municipal as well as private, to obtain the uniform rate prevailing throughout the entire large systems which absorb them. Wendell L. Willkie has dramatically brought this point home with records from the Commonwealth & Southern's Georgia, Tennessee, and Alabama and Michigan subsidiaries' experience which indicate, with negligible exception, that acquired companies' rates were substantially lowered when they entered the Commonwealth & Southern systems, and customers at once received the lower uniform rate.

THE utility industry's first major thesis, therefore, is that rates, fundamentally, are fixed by economic laws. The industry's second argument is that rates already are low in relation to other items in consumers' budgets. In 1937, for example, the average residential customer paid $34.81 yearly—less than a dime a day or between 2 and 3 per cent of his income — for electricity. A 10 per cent decrease in the cost of electricity would constitute a decrease of but one-quarter of one per cent in the consumer's living expenses, rate makers point out.

IT is contended by the industry, too, that when consumers were dropping items from their scale of living during the depression years, they nevertheless were increasing their consumption of electricity and were purchasing appliances in order to increase their consumption still more. From this it is argued that the consumer places a higher value on his electricity than on many other things on which he spends his income.

Similarly for the industrial consumption of power. In a defense of its rate structure, the Detroit Edison Company stated that it takes 568 kilowatt hours of electric energy to manufacture an automobile to be sold at about $700. The power bill for this car is $7. Reduction of the power charge from $7 to $6 would not result in material reduction of car production costs, for as a Detroit Edison Company official put it, "A 1 per cent tail cannot wag a 99 per cent dog, and a 10 per cent change in a 1 per cent item is microscopic in its effect on sales."

¶ "THERE *is naturally a limit to declining domestic rates. The utility industry in this respect faces a regulatory situation analogous in important respects to that of the railroads, although the railroads' plight cannot be laid wholly to government intervention. If the assault on rates continues to a point where inadequate returns cripple the industry's ability to attract capital, consumers may be worse off than if they paid a remunerative schedule of rates.*"

The utility industry contends, further, that lower rates do not necessarily bring increased sales, and particularly is this true, rate makers declare, if you reduce the top layers of the rate structure, the charges for the first block of minimum lighting requirement kilowatt hours.

The Detroit Edison Company documented a claim that lower rates do not necessarily increase consumption with results from a survey involving sixteen major changes in rates between 1919 and 1937. On four occasions rates were increased, on twelve occasions decreased. By counting the rate changes separately on its three classes of service (domestic, commercial, industrial) Detroit Edison had sixty opportunities during the 20-year period to observe the effect of rate changes on sales.

On the four occasions when rates were increased, the years that followed saw two increases in the volume of energy sold and two decreases.

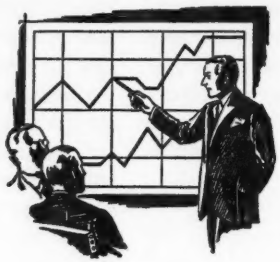
On the twelve occasions when rates were decreased, the years following witnessed ten increases in sales and two decreases.

SUMMED up, this indicates five times as many increases in sales after rate reductions as decreases. Chances are five to one, then, that rate decreases are more likely to result in sales increases than decreases. But the Detroit Edison study disclosed that on forty-four occasions when rates were neither increased nor decreased, there were thirty-seven increases in sales and seven decreases in sales—a ratio of 5.3 to one. To conclude from this data alone that the price of electricity is a minor factor and not a controlling one in determining the volume of electricity sold would be hazardous. Yet the data of the Detroit Edison Company do show that factors other than price materially affect the volume of sales.

Consequently, many executives (although probably not enough to satisfy critics) feel that if earnings of a utility and its prospects justify a general reduction of rates, a reduction should be made. To make a reduction, however, to all customers in the hope that some will buy appliances and so increase sales enough to offset reductions made to all customers is not sound business.

The industry's case boils down to the contention that it, chiefly, is responsible for the downtrend in rates. Utility men even contend that the New Deal has retarded rate reductions rather than accelerated them.

The Wagner Act, it is held for example, has increased labor costs. The Guffey-Vinson Coal Control Act has deterred coal price reductions. The Public Utility Holding Company Act of 1935 and the Securities and Exchange Act have increased refinancing costs and discouraged the trimming of interest costs. (Recently, the Consolidated Edison Co. of New York was taken to task by the state public service commission for spending close to $8,000,000 to bring out six issues of securities aggregating $260,000,000—an expenditure of 3 per cent of the principal amount of the securities!) Tax increases are cited, too, including the Federal excise tax on electricity and higher income taxes. Not the least is the increased cost arising from the expanded number of reports and questionnaires from government and state regulatory bodies to which utility accounting staffs and executives must devote themselves.



Downward Trend of Rates

"... will continuing pressure on rates render returns inadequate and undermine the industry's ability to attract additional capital? Government power advocates contend that pressure from Federal 'yardstick' projects and from government-financed municipal plants drove rates down. Private utility spokesmen point out that rates have moved continuously downward since the industry's inception and were already declining even when no regulation existed."

So much for the utility industry's rate case. In answer, government power advocates can show that rates to domestic consumers in areas affected by government "yardsticks" have declined more rapidly than elsewhere, and usage of power as well has advanced more rapidly than consumption of power elsewhere in the country.

Rates to domestic consumers for the country as a whole, as we have seen, fell from 5.57 cents a kilowatt hour in 1932 to 4.39 cents in 1937, a decline of 23 per cent. Rates of Commonwealth & Southern subsidiaries in the TVA area, however, fell 41 per cent in the period, and rates of the Tennessee Public Service Co., an Electric Bond and Share unit which recently was sold to the city of Knoxville, fell 48 per cent!

Of course it must be pointed out that the rates of the Consumers Power Co., a Commonwealth & Southern subsidiary in Michigan, had declined by 1937 to 3.19 cents an hour, a level that is only 1.1 mill higher than the composite 3.08 cents per kilowatt hour charged by private utilities in the TVA area. In other words, the Commonwealth & Southern Corp. can make out a good case for its contention that rates of its northern companies were declining as rapidly as those in the TVA-dominated valley.

But comparisons of other systems' northern and southern properties do not strengthen the private utilities' case. Against the present 3.65 cents per kilowatt hour charged by the Tennessee Public Service Co., an Electric Bond and Share unit in the TVA area, the Pennsylvania Power & Light Co., an Electric Bond and Share Co. subsidiary, unaffected by government competition, charges 5.71 cents per kilowatt hour. The Kansas Gas & Elec-

tric Co., another Bond and Share unit, charges 4.63 cents per kilowatt hour. Thus, while the rate of Bond and Share units in the TVA area fell 48 per cent during the 1932-1937 period, the rates of the two companies unaffected by government competition fell 20 per cent in Pennsylvania and 9 per cent in Kansas.

DURING the five years which saw rates decline steadily in the TVA area, power sales and gross revenues rose just as steadily. The rôle which the TVA rates played in increasing output and expanding revenues is somewhat obscured by the circumstance that the period of expanding power production coincided with the post-depression years of rapid recovery. Thus government power advocates ascribe the Tennessee Electric Power Company's 100 per cent sales rise and 29 per cent expansion in revenues to the lower rates. Commonwealth & Southern officials, on the other hand, ascribe the improvement to economic recovery.

The government has a point, however, as comparison of average power consumption in the TVA area with that in the rest of the country will show. Customers of the four Commonwealth & Southern subsidiaries who had been purchasing an average 724 hours of electric energy in 1932 had jumped their purchases to 1,260 kilowatt hours by 1937, a rise of 74 per cent! For the country as a whole, as we have seen, domestic power consumption rose but 27 per cent.

The government's yardstick projects undoubtedly are accelerating the long-term downward trend of domestic electric rates. The question is, are they doing so with any regard as to whether a fair return on private utilities' required investment is being squeezed or even eliminated in the process?

The established system of public utility regulation in the United States calls for rates that will yield such a fair return. The success of a program of depressing utility rates, therefore, cannot be gauged by the extent of the decline, but rather by the ability to bring about a decline without undermining the industry's ability to attract additional capital.

PROFIT margins of the utilities are undoubtedly narrowing. Evidence, however, that declining domestic rates are as yet depriving the industry of adequate returns is lacking.

Rates for the 12-month period ending May 31st, for example, averaged 4.32 cents per kilowatt hour, a 4.8 per cent decline from the average rate of the prior 12-month period. Revenues for the period declined 1½ per cent although residential customers increased 10 per cent. These figures might provide effective ammunition for those in the utility industry who contend that lower rates do not increase revenues were it not for the fact that the 12-month period ending May 31st saw industrial power sales plunge 18 per cent.

While the utility industry and the investor are naturally apprehensive over the unceasing attack against rate structure, the effect of this attack must not be exaggerated. For one thing, the assault has chiefly been directed against domestic rates. Commercial and industrial rates which account for 60 per cent of utility revenues have been left pretty much alone, and during the last

year, at least, have held their own. Logically so, since political pressure is exerted most effectively by the numerous residential users, and least effectively by the relatively few, though important, commercial industrial users. Furthermore, as the record of the 12-month period ending May 31st shows, domestic rates may go down, but customers increase and revenues as a whole are sustained.

There is naturally a limit to declining domestic rates. The utility industry in this respect faces a regulatory situation analogous in important respects to that of the railroads, although the railroads' plight cannot be laid wholly to government intervention. If the assault on rates continues to a point where inadequate returns cripple the industry's ability to attract capital, consumers may be worse off than if they paid a remunerative schedule of rates.

As has been amply illustrated in the railroad industry, inadequate returns prevent enterprise from keeping pace with advancing technology and thus bring correspondingly poorer service in time.

As Socialist Editors View the Consolidated Edison Case

"THE Supreme Court has accepted with straight face a doctrine it would have dismissed two years ago as too far-fetched to be taken seriously. The decision of the Supreme Court in the Consolidated Edison Case is a measure of how much our highest tribunal has changed since Mr. Roosevelt in 1937 had the courage to use 'the birch rod in the cupboard' on judges as well as on utilities. In May, 1935, the Supreme Court did not think working conditions in the bituminous coal industry of sufficient interstate importance to warrant Federal regulation under the commerce clause. But in the Consolidated Edison Case a purely intrastate utility is brought under the National Labor Relations Act on the tenuous ground that it also supplies electricity to several interstate railroads, steamship docks, post offices, and an airport. The court might almost as easily have held that the Brothers Schechter came under Federal authority because they sold some of their chickens to Pullman diners. It is easy for us to understand, though we enjoy, the bewilderment of Justices Butler and McReynolds in their dissent. The old gray Constitution ain't what she used to be."

—EXCERPT *from The Nation.*

Wire and Wireless Communication

On February 9th Senator Wheeler of Montana introduced his bill to reorganize the FCC by abolishing the commission as presently constituted and setting up in its place a 3-man commission to be known as the "Federal Communications and Radio Commission." This bill —conceded to have administration backing, as evidenced by the support of Chairman McNinch of the FCC—does not change any substantive provisions of the Communications Act of 1934. It deals only with the administrative set-up. It is a ripper bill pure and simple. It is apparently the strategy of the administration to leave the important policy-making changes in the Communications Act for a more leisurely deliberation of Congress, perhaps following a congressional investigation of the entire subject of Federal regulation of communications.

Washington observers are still inclined toward the belief that Congress will not be disposed to let the administration succeed in thus dividing the problem in half and rushing that half in which it is politically interested towards hasty legislative solution. In short, it is generally believed that Congress will take its time and do the whole job at once.

However, Senator Wheeler, who is chairman of the Senate Interstate Commerce Committee, was planning to get his subcommittee hearings started along about March 7th. Meanwhile, the Senate opposition was rallying under the leadership of Republican Senator White of Maine. In the lower house there was little sentiment displayed either for or against Senator Wheeler's measure.

The outstanding feature of the Wheeler bill is its attempted divorce of the commission staff from the direct control of the commission as a whole and its subordination to the domination of the chairman. This will doubtless be explained as a proposal for more orderly organization. It has already been suggested by New Deal critics of old-fashioned Federal regulatory set-ups that commission members should occupy themselves principally with policy making, with quasi judicial and with quasi legislative duties delegated by Congress; whereas the staff should be, in the interest of efficiency, subject to more definite administrative discipline.

As a practical matter, however, the so-called administrative functions of a staff have a great deal to do with what comes before the commission as a whole and in what form it gets there. The Wheeler bill divorces the staff from the direct control of the commission by dividing the staff into three sections: (1) broadcasting; (2) communications carriers (including telephone, telegraph, and cables); and (3) international radio and communications.

Next the bill provides that each of these branches must function under an "administrative assistant" and that each administrative assistant shall function "under the administrative supervision of the chairman." The chairman, inciden-

tally, would be designated by the President as "the principal executive officer of the commission." And, finally, the administrative assistant in charge of each of the respective divisions "shall be responsible for the efficient and expeditious handling and presentation to the board of all matters relating" to the work of the particular division.

The Wheeler bill thus seems to emerge as essentially a one-man control bill, even though the so-called "administrator" device, which has been used in other New Deal regulatory legislation, is astutely blanketed under the office of the chairman. The commission as a whole would still exercise all the nominal jurisdiction of the commission (two of the three commissioners would make a quorum). But the bulk of the work which the FCC has heretofore handled *en banc,* except the making of final decisions in contested cases involving the taking of testimony at public hearings, would, as a practical matter, be delegated to the staff. In this connection it will be recalled that even as presently constituted the FCC on November 9, 1938, ordered a new procedural set-up of vital importance.

Under the new set-up the FCC no longer has a preliminary hearing of facts before an especially qualified examiner who has authority to make independent findings by reason of his Civil Service status. Previously, the FCC followed the ICC practice in acting chiefly on the basis of such examiner's reports in important contested cases. Under the new set-up there is an employee of the commission —presumably a lawyer—designated to take testimony which is then prepared under the auspices of the staff of the general counsel for the submission of proposed findings of fact to the commission. The theory is to eliminate cumbersome processes by narrowing down the points of contest for each party to a given proceeding. In this form the record reaches the commission for final action.

TESTIFYING on this change of procedure, which would probably be carried over to the new commission if the Wheeler bill were enacted, Chairman McNinch, on January 23rd before the House Appropriations subcommittee (hearings, Independent Offices Appropriation Bill, page 1513), said that he saw no reason why

> A bright young lawyer, at $2,400 a year, could not sit and take evidence; for he is not, as you recall, to make any comment or findings on the evidence, or do anything whatever with the evidence as taken except to transmit it bodily to the commission as taken. He has no other function or duty in connection with it.
>
> MR. DIRKSEN. He makes no findings?
>
> MR. MCNINCH. None whatever.
>
> MR. WIGGLESWORTH. He does not prepare a report that goes to the commission?
>
> MR. MCNINCH. No, sir.
>
> MR. WIGGLESWORTH. That is prepared by some attorney in the force?
>
> MR. MCNINCH. Whoever the commission may direct.
>
> MR. WIGGLESWORTH. It may be entirely a different person from the one who takes testimony?
>
> MR. MCNINCH. It might be.
>
> MR. WIGGLESWORTH. There are no special requirements; anybody may be designated.
>
> MR. MCNINCH. Yes, sir.

One other feature of the Wheeler bill would be the establishment of a rates and research division which would analyze regulatory problems relating to all forms of communications. The Wheeler bill would transfer the present staff of the FCC to the new agency for sixty days and possibly for an additional trial period so as to give the new commission a chance to determine qualifications of the various employees. All the employees with the exception of principal staff officers and the attorneys would be classified under Civil Service.

THE introduction of Senator Wheeler's bill to reorganize the FCC was understood to be the principal explanation for the failure of the Appropriations Committee of the House of Representatives to include any appropriation for the FCC as part of the "Independent Offices Appropriation Bill for the Fiscal Year 1940." The budget committee had recommended an appropriation of slightly more than $2,000,000.

While it is thus obvious that the Appropriations Committee was marking time to see what would happen to the

Wheeler legislation, Washington observers were not inclined to place too much importance on that point, since the committee could include a 1940 fiscal year appropriation for the FCC as presently constituted almost any time during the session, as part of the deficiency appropriation bills which invariably come along later on. Furthermore, it is to be noted that the Senate confirmed the reappointment of Commissioner Case to the FCC as presently constituted.

Coincident with the report of the Appropriations Committee — without the FCC appropriation—there were released the hearings before the House subcommittee on appropriations, which included the verbatim report of testimony taken January 23rd. These hearings reveal that representatives of the FCC—particularly Chairman McNinch and Commissioner Walker—were critically examined by the Congressmen on the subcommittee.

Most critical, perhaps, was Representative Wigglesworth, Republican of Massachusetts, who has been striving for the last three or four years to have a congressional investigation of the FCC with special emphasis on its regulation of radio.

Mr. Wigglesworth carried his grievance to the floor of the House on February 6th, when he charged that the do-nothing attitude of the FCC had resulted in the growth of radio monopoly. After criticizing the commission's handling of the special telephone investigation, Mr. Wigglesworth referred to articles in *Business Week* for December, 1938, and *The Washington Post* of December 7, 1938, which suggested that New Deal adviser Thomas G. Corcoran was then becoming active in promoting legislation to reorganize the FCC, with the idea of making it more amenable to administration discipline. Mr. Wigglesworth referred to Chairman McNinch's subsequent denial that he had any knowledge of such legislation being drafted. The Massachusetts member then reviewed events which have occurred in the FCC since the appearance of these prophetic articles and concluded:

> Mr. Chairman, the steps taken by the FCC, to which I have referred, look very much to me like steps along the course outlined in the newspaper articles to which I have referred, taken in conjunction with the proposed 3-man set-up; they look to me very much like an attempt to wipe out the commission as we have known it in the past and to substitute a more centralized administration. They look further very much like an attempt to bring this quasi judicial agency under the domination of the executive branch of the government, in line with the proposal embodied in the original reorganization bill a year ago which excited such condemnation from those primarily affected.
>
> I could speak at length and in detail on this subject, Mr. Chairman, but I shall conclude. The move for a thoroughgoing congressional investigation of radio broadcasting and its regulation gained powerful support in this House last session. The President of the United States has now stated publicly that he is thoroughly dissatisfied with conditions at the commission, and recommends remedial legislation.

THE hearings before the House Appropriations subcommittee also revealed that progress was still being made by the FCC on the special telephone investigation. After Commissioner Walker had been singled out for cross-examination as to the methods employed in the special telephone investigation (to which he replied with interesting defensive memoranda), Chairman McNinch responded as follows to a Congressman who implied that Commissioner Walker's "proposed report" on the special investigation was unfair:

> . . . the commission staff members are checking the (Bell) comments against the Walker report and where statements are made in the Walker report which are controverted by the telephone company in their comments and we have no supporting data or factual material, we are deleting any statement in the Walker report of that sort —any unsupported statements. If you mean [to ask me] whether I think that that method of taking evidence will, with certainty, present as complete a picture as one which included an opportunity to introduce evidence and to cross-examine the witnesses, my answer, candidly, would have to be no.

It is generally believed that the commission will make some effort to complete its final report on the telephone investigation during the current session of Congress, unless Senator Wheeler makes much better progress with the adminis-

tration's reorganization bill than has been shown to date. In the latter event the FCC might decide to postpone the final report on the investigation so as to let the new commission participate.

Commissioner Walker stoutly defended his course of action by pointing out that the special investigation was essentially a "legislative" investigation, such as a committee of Congress would conduct, and as such, he observed, the usual rules of procedure with respect to cross-examination and rebuttals in the introduction of defensive testimony were not necessarily applicable.

He pointed out in a memorandum that the Bell companies in former years have engaged in protracted litigation over regulatory proceedings of such a quasi judicial nature, and that the FCC had neither funds nor the time to permit the special investigation to grow into such an elaborate proceeding by allowing for replies, rejoinders, surrejoinders, etc.

REPRESENTATIVE Wigglesworth during the House subcommittee hearings asked Chairman McNinch bluntly, "Have you formulated anything that might be called a national communications policy?" To which Chairman McNinch replied:

> Not if by that, Congressman Wigglesworth, you mean a policy of balancing all communications from a national standpoint. From time to time, policies have been enunciated in decisions, but I think the answer to your question, fairly, is probably "No; we have not undertaken that, for a lack of the necessary information," awaiting what this commission will determine to report to Congress about the telephone industry, for one thing. We were waiting upon the report received three or four days ago from this committee on superpower, as we ordinarily refer to it. We will wait—at least it is my judgment we should wait—until the committee conducting the network and monopoly hearings has completed its investigation, in order that we may really have the basis of factual information, upon which we could predicate an intelligent communications policy.

WHILE the Bell telephone industry was following with interest these new angles on the special telephone investigation, the independent telephone industry was rallying its support behind bills in Congress to relieve small telephone exchanges from oppressive burdens which might result from compliance with the Wage-Hour Act. A committee of the United States Independent Telephone Association conferred during the month of January and the first part of February with Wage-Hour Administrator Andrews, but, beyond a sympathetic reception, the committee could come to no definite solution of the industry's problem.

The association finally secured the introduction of a bill which will probably be known as the Herring-Harrington bill because it was introduced in the Senate by Senator Herring of Iowa (S. 1234) and in the House by Representative Vincent P. Harrington of the same state (H. R. 3842). The text of the bill is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That §13 (a) of the act approved June 25, 1938 (52 Stat. 1069), entitled the "Fair Labor Standards Act of 1938," be, and the same is hereby, amended by adding a new subsection 11 as follows: "or (11) operators employed in telephone exchanges having one thousand subscribers or less."

Two other bills were introduced in the lower house by Representative Gore of Tennessee (H. R. 3940) and Romjue of Missouri (H. R. 3810) which used exactly the same phraseology as the Herring-Harrington bill. In addition there was introduced a bill by Representative Chapman of Kentucky which would have exempted all telephone exchanges from the application of the act and a bill by Senator McKellar of Tennessee which would have restricted the relief to telephone systems not exceeding 500 subscribers.

Independent telephone men were afraid that Representative Chapman's bill probably went too far to stand immediate chance of enactment, whereas they thought Senator McKellar's bill did not afford comprehensive relief for the industry. Accordingly, the industry's support will probably be concentrated behind the Herring-Harrington measure.

Financial News and Comment

By OWEN ELY

Utility Stocks Advance on TVA News

Many stock market observers were surprised by the relative firmness in utility stock prices when the Supreme Court decision upholding TVA was announced, but the reason soon became evident when President Willkie of Commonwealth & Southern on February 4th announced (see Public Utilities Fortnightly, February 16, 1939, p. 242) that TVA had tentatively agreed to pay $78,600,000 for the electric properties of Tennessee Electric Power Company, the company retaining its water, ice, and transportation properties. A possible settlement had been indicated several days earlier by the conferences between Mr. Willkie and Mr. Krug, but the Street had not expected so early and favorable an announcement.

Although Mr. Willkie had not named any definite figure, it had been understood that his original "asking price" was around $94,000,000, while the original TVA offer was only $55,000,000. The price of $78,600,000 is sufficient to retire Tennessee Electric's bonds and preferred stock at par and leave a few millions for the common stock (Commonwealth & Southern owns 99 per cent). The parent company should obtain about $7,000,000 in cash for its holdings of common and retain about $3,000,000 in other assets applicable to the common; it also will obtain cash for its holdings of about $7,000,000 bonds and $750,000 preferred stock.

While TVA is acting as purchaser of the properties, it is expected that municipalities will take over the electric facilities within their areas and will then contract for TVA power. Nashville and Chattanooga are the principal cities involved. Knoxville already has acquired the facilities of Tennessee Public Service Company, an Electric Bond and Share unit, and Memphis has agreed upon negotiations for the purchase of Memphis Power & Light Company, another E B & S unit. (See page 311.)

Tennessee Electric Power Company has maintained profitable operations, despite low rates and high taxes. The preliminary report for 1938 showed net income of about $11.35 a share on the preferred stocks, against $10.78 a share in 1937. Net available for the common stock was $2.80 a share in 1938 against $2.47 in 1937.

Naturally, securities of the Commonwealth & Southern system and particularly those of Tennessee Electric were favorably affected by the news of the agreement with TVA, as indicated in the following 1939 range of prices:

	Low	*High*
Tennessee Electric Power 7% pfd.	69¼	99
Tennessee Electric Power 5s of 1956	88½	100¾
Alabama Power 4½s of 1967	81½	94½
Commonwealth & Southern pfd.	45¾	63¼
Commonwealth & Southern common	1½	2¾
Dow-Jones average of utility stocks	22.30	25.52

As indicated in our revised monthly chart on page 294, utility stocks have fared better in 1939 than industrial and rail issues. The utility average is still close to its recent high, while industrials and rails have recovered only about one-third to one-half of their January decline, attributed to European war scares and a moderate decline in domestic business.

It is difficult to gauge the real importance of TVA's capitulation until there is further evidence of the government's attitude. However, recent developments at Bonneville have also been encouraging. Former President Hoover's recent speech on the folly of wasting huge government funds in hydro-electric enterprises, when steam plants are far more efficient, may help to increase popular opposition to administration policies such as revival of Passamaquoddy. The defense of states' rights by the New England governors, in connection with Federal attempts to dominate "flood control" projects in that area, together with the wide reaction of municipal voters in the West and South last November against municipal electric projects, indicates that the public is rapidly revising its opinions on the power issue. The House recently eliminated $17,392,977 of TVA funds from the Independent Offices Appropriation Bill, and this time the Senate may have greater difficulty in restoring the item in conference than it had when the House took similar action last year.

MR. Willkie has at various times expressed the opinion that if the TVA issue were amicably settled, the private utility industry would receive a tremendous upsurge and could thereby embark on a $1,000,000,000 expansion program. Recent surveys by the Edison Electric Institute and other authorities indicated that projected construction work by the utilities this year would be slightly under last year—in the neighborhood of $450,000,000. Because of the long-range planning necessary for construction work, it seems unlikely that this total will be very greatly increased, but nevertheless recent developments should clarify the longer-range outlook and stimulate expansion plans for 1940 and succeeding years. The continued successful coöperation between the SEC and the large utility systems in devising programs to conform to § 11 of the Utility Act is an additional factor tending toward restoration of investor confidence.

There is, however, a slight cloud on the utility horizon. The United States Supreme Court on February 8th took under consideration a request by Pennsylvania and the Federal Department of Justice that it approve the "prudent investment" theory of valuing utility properties for rate-making purposes. The change was advocated in connection with an order by the Pennsylvania Public Utility Commission directing the Edison Light & Power Company to reduce temporarily its revenue by $435,000 a year.

This move by the Federal government affords the Supreme Court a second opportunity (it avoided the first) to make a definite ruling on valuation practice, which it has not greatly modified since the famous Smyth *v.* Ames decision of many years ago. While that decision did not specifically set up reproduction cost, merely mentioning it as one of several factors, courts and commissions have in many cases (but by no means uniformly) used the reproduction cost basis. Hence if the Supreme Court now rules definitely for the "prudent investment" theory favored by President Roosevelt, this might be construed as bearish for the industry. In the opinion of the writer, however, such an event should not be considered too great a handicap, since it would take many years to revise the rate structure on the new basis and in the meantime utilities should continue to enjoy a rapid gain in output. Moreover, the basis of valuation is only one of two factors; the fair rate of return, also involved in the Pennsylvania Case (6.5 per cent *v.* 7.5 per cent), is also of great importance, and the Supreme Court, even as now constituted, may be expected to deal fairly with the problem as a whole, in the light of past history. A decision appears unlikely, however, before late spring or early fall.

Chicago Elevated's Reorganization Plan

MERGER of Chicago's elevated and surface lines is proposed in a re-

organization plan filed by Col. A. A. Sprague, trustee for the Chicago Rapid Transit Company. The new plan agrees substantially with one developed by Walter A. Shaw, traction adviser to Judge James H. Wilkerson, but supplements the latter by outlining proposed treatment of elevated line securities.

Colonel Sprague's plan calls for capitalization of the new company as follows: first mortgage "A" 5 per cent bonds, $72,718,350; first mortgage 5 per cent "B" income bonds, $7,002,290; preferred stock ($50 par), $98,285,067; common stock (no-par shares), $2,685,519. Of these securities the rapid transit group would receive: 5 per cent income bonds, $7,002,290; preferred stock, $35,463,602; common stock, $1,105,802.

For each $1,000 bond of the Union Elevated Railway first mortgage, Union Consolidated Elevated Railway first mortgage, and Northwestern Elevated Railway first mortgage, securities holders would get the following: 5 per cent income bonds, $220; preferred stock, 15.6 shares; common stock, 2.5 shares.

The following securities in the new company would be allocated for each $1,000 bond of the Metropolitan West Side Elevated Railway Company first mortgage, and the same company's extension mortgage; 5 per cent income bonds, $150; preferred stock, 17 shares; common stock, 2 shares.

For each $1,000 bond of the Chicago Rapid Transit Company first and refunding mortgage issues, the following would be given: 5 per cent income bonds, $100; preferred stock, 13.68 shares; common stock, 9.8 shares in the 6½ per cent series or 9.5 shares in the 6 per cent series.

For each $100 of general claims, including Chicago Rapid Transit adjustment debentures and notes of indebtedness, 2.3 shares of new common stock would be allotted. Each share of prior preferred stock would receive one share of new common stock and each share of old common stock would receive .0314 shares of new common stock.

Hearings on the new plan were to begin February 23rd.

Columbia Gas & Electric

COLUMBIA Gas & Electric Corporation has been conferring with the Department of Justice regarding a plan to end its affiliation with Columbia Oil & Gasoline Corporation. President Reynolds has also been negotiating with representatives of large holders of common stock of Columbia Oil. The Federal government a short time ago began proceedings against the two corporations under the antitrust statutes, and system executives doubtless wish to clear up this situation so that they can proceed with a refunding program.

Columbia Gas owns about $21,000,000 debentures and the entire 400,000 shares of participating preferred stock of Columbia Oil, and has the right to elect three members of the board. Columbia Oil owns as one of its major assets 404,000 shares, or 50 per cent of the common stock of Panhandle Eastern, a prosperous pipe-line company, and Missouri-Kansas Pipe Line ("Mokan") owns 324,326 shares, with an option on additional stock.

Under the divestment plan, Columbia Gas proposes to have Columbia Oil cancel its $21,000,000 debt through a refunding program for the debentures. It is proposed to offer these debentures publicly as a direct obligation of Columbia Oil, the proceeds being used to repay Columbia Gas. Sterilization of voting rights on the 400,000 shares of participating preferred stock is contemplated, and Columbia Gas executives would retire from the Columbia Oil board.

The Department of Justice had sought to terminate either (1) Columbia Gas' interest in Columbia Oil or (2) Columbia Oil's controlling interest in Panhandle. Mokan, which wants to obtain control of Panhandle, has sought to have the Columbia interest divorced entirely from Panhandle. Sometime ago it was reported in Wall Street that Columbia Oil might make a public offering (through an underwriting group) of its stock holdings in Panhandle, but apparently this idea has been temporarily abandoned.

HOLDERS of large blocks of common stock of Columbia Oil represented in the recent negotiations included the Winmill interests. Other large holders of Columbia Oil common, identified mainly with Columbia Gas, represent in the aggregate approximately 13 per cent of the outstanding equity stock. Philip Gossler, chairman of the board of Columbia Gas, together with immediate members of his family, owned 5.3 per cent of the common stock of Columbia Oil in April, 1938. Other officers, directors, and employees of Columbia Gas held approximately 4 per cent at that time; and the United Corporation, which owns 19½ per cent of outstanding Columbia Gas common stock, held 3.6 per cent of Columbia Oil common.

Columbia Gas & Electric on February 7th filed with the SEC a plan for additional steps to effect corporate simplification and integration under the Utility Act. The corporation controls operating companies chiefly in Ohio, West Virginia, Pennsylvania, New York, Kentucky, and the District of Columbia, and its present set-up is thought to comply substantially with the requirements of § 11. The additional changes would be as follows:

Atlantic Seaboard Corporation, the only subsidiary company of Columbia Gas & Electric Corporation which is a holding company, will sell the stocks and indebtedness which it owns of Amere Gas Utilities Company, Virginia Gas Distribution Corporation, and Virginia Gas Transmission Corporation to Columbia Gas & Electric Corporation. These three companies will thereby become 100 per cent owned and will be direct subsidiary companies of Columbia Gas & Electric Corporation. The Atlantic Seaboard Corporation will cease to be a holding company.

The following subsidiary companies of Columbia Gas & Electric Corporation will cease to control any other companies:

The Cincinnati, Newport & Covington Railway Company. This company owns all the stock of the Licking River Bridge Company (not a public utility company), which has no assets and will be dissolved.

The Fayette County Gas Company. This company owns all the stock of the Fayette Gas Fuel Company (not a public utility company), which has no assets and will be dissolved.

The Manufacturers Light & Heat Company. This company owns all the stock of Sewickley Gas Company (not a public utility company), which has no assets and will be dissolved.

The United Fuel Gas Company. This company owns approximately 71.6 per cent of the outstanding stock of Big Marsh Oil Company (not a public utility company). United Fuel Gas Company will transfer its stock in Big Marsh Oil Company to Columbia Gas & Electric Corporation in partial liquidation of its indebtedness to Columbia Gas & Electric Corporation.

Eastern Pipeline Company will sell its physical assets to Home Gas Company and Eastern Pipeline Company will be dissolved. Application for the necessary authorization has been made to the public service commission of New York state; hearings have been held thereon, but no order has as yet been entered.

The following inactive subsidiary companies of Columbia Gas & Electric Corporation which are not public utility companies will be dissolved: Chenango Gas Company, Inc., the Consumers Natural Gas Company, the Liberty Light & Power Company.

The corporation stated that upon the consummation of the changes set forth, Columbia Gas & Electric Corporation will own directly 100 per cent of the outstanding voting stock of 31 subsidiary companies; more than 95 but less than 100 per cent of the outstanding voting stocks of seven subsidiary companies; and more than 50 per cent but less than 95 per cent of the outstanding voting stocks of two other subsidiary companies which are not public utility companies. None of these subsidiary companies will own or control any other company, the corporation added.

International Paper to Sell Utility Interests

DIRECTORS of International Paper & Power Company have advised the SEC of a decision to dispose of their utility interests, said to be worth over $500,000,000, confining the company's interest to its $250,000,000 paper and other nonutility interests. It is reported that the utility holdings of International Paper & Power Company and International Hydro-Electric System (principally in New England) will be transferred immediately to independent trustees who will administer them until their sale within two to four years.

This proposal, if approved by the SEC, may form an important precedent

for other large systems to follow in formulating plans under § 11. The device of placing properties under independent trustees affords a breathing spell during which plans for eventual sale could be thoroughly canvassed and perfected.

It was announced that system holdings of the common and Class B shares of International Hydro-Electric System, the holding unit for power properties, will be transferred to the following trustees: Redfield Proctor of Proctor, Vt., former governor of Vermont; C. Brooks Stevens, Lowell textile manufacturer; and Henry G. Wells of Haverhill, formerly a member of the Massachusetts Department of Public Utilities.

At the close of 1937, the corporation's records show, Paper subsidiaries owned mills with a capacity of 2,400,000 tons of pulp and paper yearly, the largest in the world. Timber holdings are located mostly in Canada, with mills in Maine, New Hampshire, Vermont, New York, Louisiana, Massachusetts, Arkansas, Mississippi, Florida, Alabama, Wisconsin, Michigan, Illinois, Ohio, Pennsylvania, and South Carolina. International Hydro-Electric System controls companies serving a total population of about 2,750,000, chiefly in New England, New York state, and Canada.

Utilities Power & Light to Sell Major Properties under New Plan

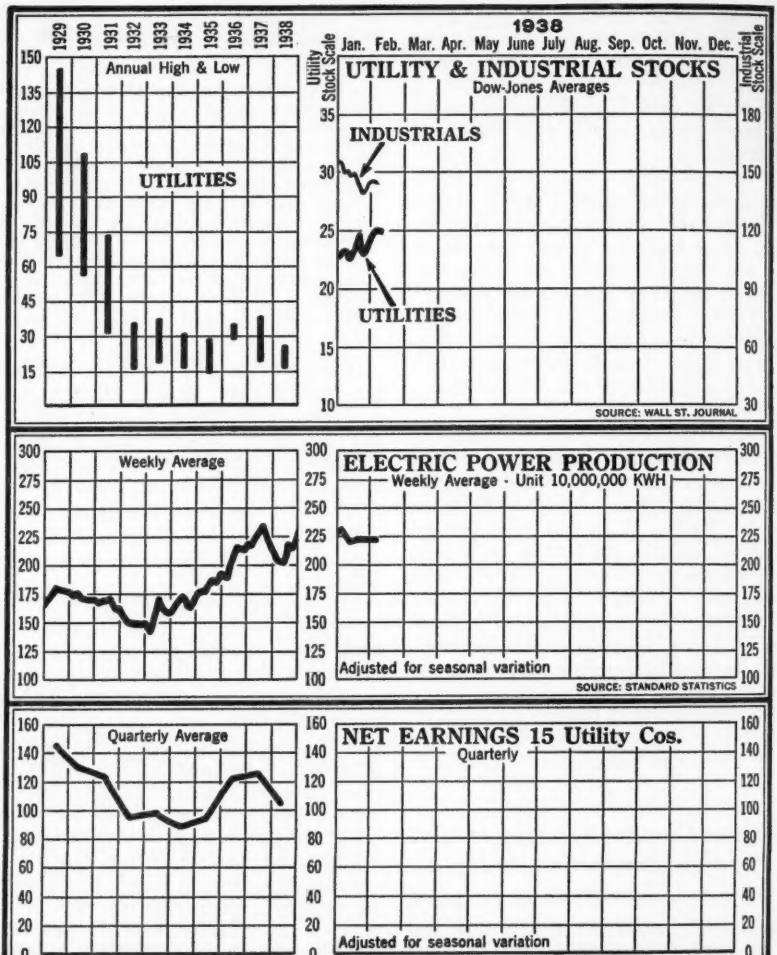
ATLAS Corporation, which has important interests in the Utilities Power & Light system, has decided that the geographically diversified properties of the latter cannot be successfully integrated under § 11 of the Utility Act, and has proposed to the SEC and the Federal court at Chicago a new reorganization plan, whereby Utilities Power & Light Corporation would be converted into an investment company through sale or other disposal of its present assets. This change would be commenced promptly and completed as soon as practicable, the utility investments of the new corporation being limited eventually to 5 per cent of its total assets. The plan specifies:

> In the process of the conversion into an investment company precedence shall be given to the sale of the interests of Utilities Power & Light in Derby Gas & Electric Corporation and its subsidiaries, in Newport Electric Corporation, and in other controlled utility units that are not readily capable of being incorporated into any feasible integration program, to the end that even prior to the elimination from the system of Utilities Power of all controlled units the new company will have complied with the integration provisions of the Holding Company Act.

The proposed new company will have no funded debt, and preferred stock will not exceed 50 per cent of total capital. All assets of the present holding company would be turned over to the new company, which (under supervision of the SEC and Chicago court) would carry out the divestment program. The plan of exchange may be summarized as follows:

Holders of each $1,000 Utilities Power & Light 5 per cent debenture bond (and of equal-rank claims) would receive $400 new debentures (less any cash distribution), 6 shares of $50 par preferred stock, and approximately 50 shares of common stock of an assumed value of $6 per share. The holders of the 7 per cent preferred will receive for each share, 5 shares of new common. Class A, Class B, and common stockholders will be "wiped out" in the reorganization since it is felt that there is no "equity" remaining for these interests. They will, however, be permitted to subscribe to an additional 2,000,000 shares of new common stock which would be offered first to new preferred holders with the unsubscribed portion going on a subscription basis successively to the holders of new common, Class A, Class B, and old common stock.

The new plan appears to mark the finish of the long struggle between Associated Gas and Atlas Corporation for control of Utilities Power & Light. Atlas is a large holder of debentures, while Associated's $10,000,000 investment is principally in stocks.


1929 1930 1931 1932 1933 1934 1935 1936 1937 1938
Annual High & Low
UTILITIES
1938
Jan. Feb. Mar. Apr. May June July Aug. Sep. Oct. Nov. Dec.
Utility Stock Scale
Industrial Stock Scale
UTILITY & INDUSTRIAL STOCKS
Dow-Jones Averages
INDUSTRIALS
UTILITIES
SOURCE: WALL ST. JOURNAL
Weekly Average
ELECTRIC POWER PRODUCTION
Weekly Average - Unit 10,000,000 KWH
Adjusted for seasonal variation
SOURCE: STANDARD STATISTICS
Quarterly Average
NET EARNINGS 15 Utility Cos.
Quarterly
Adjusted for seasonal variation
SOURCE: STANDARD STATISTICS
Monthly Average
UTILITY FINANCING Millions of Dollars
REFUNDING
NEW CAPITAL
Jan. Feb. Mar. Apr. May June July Aug. Sep. Oct. Nov. Dec.
1938
SOURCE: FINANCIAL CHRONICLE

What Others Think

A Symposium on Public Ownership And Utility Regulation

THE first (January) 1939 issue of *The Annals* of The American Academy of Political and Social Science is devoted for the most part to the general topic "Ownership and Regulation of Public Utilities." This makes the twelfth time in the last thirty-three years that the scholarly *Annals* has thus been given over to some form of general discussion concerning public utility management, ownership, and regulation.

Because of rich contributions in *The Annals* of the past to this controversial field, one may perhaps look for too much or expect too much in the way of new ideas and new views on what is, after all, a pretty hackneyed subject. In any event, an overanxious reader of this latest edition of *The Annals* may be somewhat disappointed in the result. To be perfectly frank, there seems to be no outstandingly original approach in the collection of papers there assembled.

If this should be the reaction of the reader, it is obviously not the fault of the editor of this particular edition—Dr. G. Lloyd Wilson, professor of transportation and public utilities at the University of Pennsylvania. Dr. Wilson has clearly made an attempt to balance the various papers between those who feel more or less sympathetic to, and those who might be more critically disposed toward, public ownership of public utilities as an alternative to public regulation of private utilities.

Furthermore, he has assembled an impressive list of contributors, including such government officials as TVA Power Director Lilienthal, Acting Chairman Seavey of the FPC, REA Chief John M. Carmody, ICC Commissioners Splawn and Aitchison, Chairman Edward J. Noble of the Civil Aeronautics Authority, and Assistant Attorney General Robert M. Cooper. From the academic and economic field, Dr. Wilson (in addition to his own contribution on the London Passenger Transport Board) has drawn such well-known figures as Professors Watrous H. Irons and R. H. Montgomery of the University of Texas; Dean William E. Mosher of Syracuse University School of Public Affairs; Professor Herbert B. Dorau and Dean John T. Madden of the New York University School of Commerce, Accounts, and Finance.

There were, in addition to these professors who wrote chiefly on the subject of power utilities, a number of others (some from foreign institutions) whose papers were more or less confined to the subject of transportation.

PROBABLY the one notable deficiency in this otherwise blue ribbon assembly was the absence of papers from practical operating utility executives, or from editors of the various utility trade publications, who could surely be depended upon to discuss the problem with as much, if not more, gusto and realism than some of the learned professors who are still beating the devil about the bush over testimony produced eight years ago before the Federal Trade Commission concerning utility practices which happened perhaps five years before that.

Possibly this lack of the practical, as distinguished from the academic and regulatory, approaches—with respect to the power utility field at least—is explained by Editor Wilson's expressed regret concerning the "unfortunate human propensity to fail to observe publication deadlines." This reviewer could not help but think, however, how much a paper from a representative industrial pen, such as that of Wendell L. Willkie or of

Samuel Ferguson, or of the editorial staff of the *Electrical World,* might have rounded out Editor Wilson's choice collection.

Be that as it may, the papers in the power section of the issue of *The Annals* (which constituted about one-half of the collection) were, as stated before, pretty evenly divided between friends and critics of private ownership of public utilities under regulation. Because of the variety of topics assigned, however, there was comparatively little meeting on common ground. Conservatives and liberals alike swung mightily but connected with one another in few places within the entire 118 pages.

Of the government officials who contributed to this section, the production was generally quite unexciting. FPC Acting Chairman Seavey's contribution, for example, was essentially an accurate but factual recital and description of the principal provisions of the Federal Power Act and the Natural Gas Act. Administrator Carmody contributed an interesting discussion of the functions of the Federal REA and the progress that has been made to date. It struck this reviewer as being not quite as comprehensive or provocative as the similar paper which Mr. Carmody sent to the meeting of the World Power Conference in Vienna, Germany, last fall.

MR. Lilienthal's paper was noticeably cautious. He developed the idea (which he had already expressed in previous discussions) that public interest demands a broader concept of electricity. He deplored the price-of-a-good-cigar argument by which utility executives have been known to minimize the importance of domestic electric cost, as compared with other living costs. He visualized electricity as a symbol of progress, emancipating the city and farm workers alike by sheer abundance of a cheap power supply.

Mr. Lilienthal's paper threw little light upon the ultimate showdown with which TVA and other Federal projects will be faced in relation to private industry—when the Federal government will have to decide upon a definite policy, whether to operate these projects as fair yardsticks or as avowed and aggressive competitors of private industry under any circumstances.

Mr. Lilienthal's paper touched on this point as follows:

> Everyone wants investment in useful property of privately owned utilities to be protected. No one wants uneconomic competition. No one wants the waste of duplicating facilities; no one wants two electric systems in a community where one will serve as well. But private monopoly has an obligation on its side to deal fairly with the community, to recognize the public nature of the enterprise in which it is engaged, to acknowledge that the public interest with respect to electricity is paramount.

The paper of Robert M. Cooper, special assistant to the Attorney General, seemed to be the most provocative of contributions by Federal officials. He skillfully developed, according to his own view, the background and breakdown of the "administrative process" for the regulation of privately owned and operated public utilities. Generally speaking, Mr. Cooper believes that the reason for this "breakdown" is the basic conflict between the profit motive of private management and the public service motive of commission regulation. In the clash of these two objectives he sees commission regulation as "more a half-hearted compromise than an effective instrument of control."

Nor does this author believe that the courts have contributed much constructive assistance. He regards as an unfavorable development the recent tendency of the Supreme Court to inject the judicial process into regulatory procedure, as evidenced by such decisions as Morgan *v.* Secretary of Agriculture. He touches upon the matter of protracted litigation and numerous hair-splitting disputes in rate-making formulae which have been developed by case law and concludes "the fact remains that there exists today a fundamental conflict between administrative rate control and judicial requirements which has proved detrimental to the sound functioning of the regulatory process."

HOWEVER, Mr. Cooper does not suggest public ownership as a necessary or inevitable solution to what he regards as the deficiencies of regulation today. True, he presents alternative forms of public ownership, such as the government corporation and the European mixed undertaking, in an attractive light. In this respect he notes that in England government ownership has been applied to approximately 60 per cent of the electric distribution, 40 per cent of the gas supply, 80 per cent of the local transport, 90 per cent of the water supply, and the entire communications system.

In connection with the mixed undertaking in Europe he tells us that in France the government's participation in such undertakings is fixed by law at 40 per cent, while in Germany it is about 50 per cent.

In his conclusion, however, Mr. Cooper does not rule out private ownership. He leaves it hanging on a big "if." He states on this point:

> Private utility management, if it is so inclined, is in a crucial position to make regulation work. The denial of the profit motive as a dominant factor in the operation of the enterprise, the development of a spirit of cooperative effort and understanding between management and the administrative commission, and an enduring sense of public trusteeship—all of these represent the initial steps which must be taken to render the regulatory device an effective and desirable instrument of public control.

Meanwhile, he thinks we should continue to study the interesting possibilities of public ownership both here and abroad.

Professor Irons takes a relatively lightly trodden approach to the public ownership controversy in a paper which tackles the problem of the capital required to finance public ownership. This is, he says, a practical problem which must be solved before even going into the merits of the desirability of public *versus* private ownership and operation of public utilities. If public agencies can't raise the money to buy existing private facilities or to build new ones, it doesn't much matter how desirable public ownership is—there won't be any such thing.

UNFORTUNATELY, according to Professor Irons, the profligacy of the Federal government in connection with its lending and spending policies of the last few years and easy availability of funds have created an impression that the sources of government funds are practically inexhaustible. With the national debt around forty-two billion, he thinks this is a dangerous attitude, especially since public ownership proponents seem to think that the cheap cost of money when raised through government securities has no limit. He states on this point:

> Public credit, like other forms of credit, will be sound as long as the public authority is able to meet the requirements of its contractual obligations. Each additional resort to the borrowing process by a government unit tends to bring the limit of its credit power that much closer. Because the Federal government may be able to borrow one billion dollars at a low rate of interest and with little difficulty, it does not necessarily follow that it could borrow several additional billions of dollars at the same rate of interest or with the same ease, or without seriously impairing its credit standing. On a smaller scale, this is equally true for the local governmental unit.

In other words, if the credit of public agencies which can command cheap loans (because it has heretofore been restricted to government function and buttressed by the taxing power) is diluted by successive waves of public ventures into commercial enterprise, then public agencies will ultimately arrive at a point where they will have to pay just as much for their money as private enterprise has to pay. By way of corroboration, Professor Irons compares the cost of money over various periods to Class AA and Class A municipalities and specific utility companies.

Concerning the more modern method of municipal utility financing—the revenue bond—which relieves the taxing power from the obligations of the utility investment, Professor Irons states:

> The cost of public capital will also tend to approach the cost of private capital if the

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utility plant is the sole security for the public bonds. The issuance of municipal utility revenue bonds, the amortization and service charges of which are derived solely from the earnings of the public utility property, will tend toward higher public capital costs. It is possible, also, that the increased risk resulting from municipal ownership of utilities may create a tendency toward a higher interest rate on the bonds of the municipality, particularly if the utilities do not pay.

He concludes that the manner of raising public capital for public ownership will be mostly through the borrowing power of government units. Whether this should be done is, first of all, a question of the soundness of government credit standing, and, secondly, a question of whether public ownership is desirable. The author insists that the ques-

tions should be resolved in that order before arriving at a decision to embark upon public ownership at all.

PROFESSOR Montgomery was probably the most critical of private utility ownership and most definite in his sponsorship of public ownership. His reasoning is based principally upon sociological grounds which, as applied to the electrical industry, would be roughly similar to the idea that railroad charges should cover only increment costs. Speaking of both forms of utility service, Professor Montgomery states:

> It is theoretically possible that this pricing policy could be effected under private ownership and operation, or under government ownership and private operation. Either would require huge government subsidies, and would not provide a reasonable probability that we would secure the possible benefits. Government ownership and operation offer the only practicable solution.
>
> Those arguments are equally valid for the electric industry. Power plants usually operate under more rapidly decreasing average costs than do railroads. Demand for electricity, within the range of rates possible under the proposed pricing policy, is far more elastic than is demand for railroad services. Consequently, gains to the community would be even greater.

The balance of Professor Montgomery's article is a detailed description introducing his "new techniques." One senses that this author hails his own formula as a panacea from the concluding paragraphs to which many readers will doubtless react with considerably mixed feeling:

> Profits to the nation would be real and tangible. If the average electric rates now charged by public plants in the state of Washington were nationally available, savings to consumers would approximate $1,000,000,000 annually. Even so, most of the Washington rates are still well above incremental cost.
>
> Sixty or 70 per cent of American industry still operates under some semblance of free business enterprise, flexible competitive price, and the profit incentive. It is carrying the burden of inefficient operation of the vast decreasing-cost, inflexible-price, monopolized industries. If that incubus were removed, American industry might once more reach a state of prosperity, and thereby increase the wealth of the nation.

PROFESSOR Dorau's paper goes over the somewhat harrowed ground of analyzing comparative municipal and private electric utility rates. A careful reading of the text is necessary for the details of his conclusions, although it might be said that they are considerably more favorable to private industry than would be indicated by the comparative rate data published to date by the Federal Power Commission. Speaking of comparative rates in general, Professor Dorau states:

> It may be said that no series of average typical bills for privately and municipally served communities are comparable. Municipal ownership on an isolated or even semi-isolated basis is economically obsolete except for communities of such size as gives access to a large measure of the industrial and business economies. But has not the analysis disclosed the real disadvantage of public ownership in the *form* of municipal ownership? Public ownership is uneconomically organized. Although this disadvantage may be buried in the way in which investment and operating records are kept, it nevertheless exists and is reflected in the results of rate comparisons made on the basis of otherwise comparable circumstances. Instead of leaving an invidious implication, however, the results of comparisons such as we have attempted should lead to an understanding of the inherent disadvantages of local ownership and management, be it municipal or private. Moreover, it should be apparent that the rates of neither municipal nor private establishments can fairly be expected to compare favorably with the rates offered by a subsidized Tennessee Valley Authority.

Dr. John Bauer's paper goes over this same field of comparative rates to some extent and arrives at the conclusion that would indicate the general desirability and advantage of public ownership. The principal advantage he finds as follows:

> The great advantage of public ownership is the elimination of conflicting interests between owners and consumers. The fundamental difficulty in ordinary public utility organization is the inherent divergence between private and public interests. Ownership rests with private individuals represented by the company and the particular management. Their interests inevitably differ from those of the consumers, and from the general public objective of cheap utility services for the various economic and social advancement of the community. This

divergence has particularly complicated the efforts of public regulation legally imposed upon the private utilities. While it has affected every important phase of regulation, it has interfered especially with rate control, principally in the determination and maintenance of the rate base upon which a fair return must be allowed.

It does not seem to occur to Dr. Bauer that in the event that the curb of competitive private operations were removed by the universal adoption of public ownership, there might still be a need for some system of independent regulation of publicly owned facilities. Indeed, that seems to be one blind spot in the entire collection of papers, since none of them touches on this question (recently brought so much to the fore by the TVA congressional investigation). The question is: Whether public ownership itself should be made responsible to some other government regulatory agency, such as the General Accounting Office or the Federal Power Commission.

There is also no attention given to the economic difficulties which will arise in states and other political subdivisions through the retirement from the tax rolls of taxable private utility properties and the substitution therefor of tax-exempt government utility operations. Already this is causing considerable uneasiness in some of our southern states.

DEAN Madden of New York University undertakes to show the relationship (or lack of relationship) between utility write-ups and utility rates. Of course, most serious observers in the field of utility regulation are aware of the superficial (and generally political) criticism that utility rates are based on watered stock and so forth. Dean Madden's paper does go to considerable length to demonstrate the effect of write-ups on utility rates. He includes a diagram showing the average price for 40 kilowatt hours charged by operating companies, and the percentage ratio of write-ups to capital assets for each such company. Dean Madden concludes:

> The effect of write-ups on residential rates in states without commission regulation is assumed to be similar in character to the effect in states with regulation. Presumably, if a company were free to fix its own rates, it would follow the principles of monopoly pricing, a privilege which would require it to ignore rather than to recognize either the original or book cost of its property. The elasticity of the demand for electricity would be the determining factor in fixing prices which would yield the largest net return. In fact, no utility is free to fix its own charges for service. A restraint arising from the availability of competitive fuels and the necessity of maintaining agreeable public relations may be none the less effective, even though not legal in form.
>
> The conclusion must be, therefore, that no proof exists to support the assertion that appreciation of ledger values results in higher rates than would otherwise be charged.
>
> The regulatory procedure of state commissions has thus far guarded the consumer against injury from write-ups with reasonable effectiveness.
>
> The case for public ownership has relied almost wholly on destructive criticism of private enterprise. The positive case for public ownership has been substantially neglected and subordinated. Consequently the case for municipal ownership has also substantially escaped critical appraisal on its own merits.
>
> Our conclusion is that analysis of the record does not sustain the allegations. Both the nature and the significance of "write-ups" have been misunderstood, and out of this misunderstanding unjustifiable conclusions unfavorable to the system of state-regulated private enterprise have been drawn.

THE paper by Dean Mosher strikes a refreshingly optimistic note because of the appreciable progress which he thinks has been made in recent years by commission regulation—especially in the more "up-and-coming states." He finds our public service commissions better financed than ever before. He finds indication (in recent decisions, such as the Pacific Gas and Electric Company Case) that the Supreme Court is likely to allow the state commissions more liberty of action in streamlining the cumbersome rate-making processes.

He welcomes the work of the new Federal regulatory agencies as having an increasingly wholesome effect upon state regulation, particularly in providing factual information and developing progressive procedure for the exemplification of the state commissions. He sees

in such public ownership as has occurred to date, a spur to private utilities. He sees in comparative rate statistics developed by the FPC another such spur. Concluding on a constructive note, Dean Mosher states:

> The main difficulty in utility regulation in this country rests, however, not so much with utility commissions as with the management of utility companies itself. If utility managers accepted their task as that of carrying on a semipublic business which enjoys great advantages at the hands of the public, a business that is for the most part freed from direct competition, that for the most part carries with it a guaranty of a fair return, the problem of regulation would be transformed. As long as the typical manager looks upon the utility business as any other business and seeks to derive the maximum profit from it, whether by evasion of regulation or expensive litigation, it may be anticipated that those responsible for regulation will have an uphill job and perhaps an impossible one. The most important reform in connection with the utility industry is, in the writer's opinion, the adoption of a public service attitude on the part of those who are responsible for supplying utility service.

The foregoing analysis has been confined to that portion of *The Annals* which involved electrical utilities. It does not go into the number of excellent papers on the subject of transportation utilities. In addition, the issue includes a paper by Professor Roland B. Eutsler, of the University of Florida, on public and private ownership of water supply utilities, and another by Professor James M. Herring of the University of Pennsylvania on public *versus* private ownership of communications facilities.

—G. E. D.

Trend toward One-man Control of Federal Commissions

WITHIN a fortnight after the opening of the first session of the 76th Congress, a bill to reorganize the Interstate Commerce Commission was introduced by Chairman Lea of the House Interstate and Foreign Commerce Committee, which immediately challenged the attention of all students of regulation and regulatory trends. It is commonly assumed by Washington observers that the present Federal administration would really like to reduce the status of several of the so-called independent regulatory commissions to the level of subbureaus of regular Cabinet departments. An example of this plan can be seen already in practice in the regulatory authority exercised over the rates and service of stockyard operators by the Secretary of Commerce, under the Stockyards and Packers Act.

Concrete proposals to reorganize the Federal regulatory agencies along this line actually found their way into the original draft of the President's controversial bill for the reorganization of administrative agencies which was finally defeated in the House of Representatives last spring.

The new bill by Chairman Lea for reorganization of the ICC is said to be a compromise between a strong faction in Congress which wants to retain the independence of Federal commission regulation, and the views of the administration reformers who feel that too much independence on the part of Federal commissions has resulted in confusion of the administrative work, for which these commissions are responsible.

An earlier model of such legislative compromise is to be found in the Civil Aeronautics Act of 1938 which set up the Civil Aeronautics Authority—a commission of five members—for the purpose of regulating commercial aeronautics in interstate commerce (or, in other words, a sort of specialized ICC for airplane carriers).

This Civil Aeronautics Act proceeded apparently on the theory that the policy-making functions ought to be divorced from administrative functions in Federal regulation of the important growing

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industry of commercial aircraft transportation. To do this, the act set up within the framework of the 5-man commission an "administrator" designated by the President from the membership of the authority, whose duty and responsibility is to look after administrative details and the enforcement of the act. This leaves the authority free to occupy itself with rate making and other quasi legislative functions.

The outstanding feature of the new bill by Chairman Lea is that it would enlarge the membership of the ICC to nineteen, dividing it into three separate divisions. The first would be a rate division of nine members; the second would be an appeal division of five members; the third would be a finance division of five members which would exercise all jurisdiction invested in the ICC other than those functions specifically taken care of by the first two divisions.

But aside from this startling innovation and the fact that the Lea bill would

enlarge the ICC jurisdiction to cover all common carriers, whether by railroad, inland waterways, motor vehicle, pipe line, or aircraft, Chairman Lea also incorporates in his bill the idea of one-man administrative control in the form of a transportation administrator.

Hearings on the bill opened before the House Interstate and Foreign Commerce Committee in Washington on January 24th. In offering his endorsement of the principles embodied in the Lea bill for reorientation of Federal regulation of transportation, Commissioner Walter M. W. Splawn of the Interstate Commerce Commission on January 25th told the House Interstate Commerce Committee that the railroads might spend $2,000,000,000 in modernizing and expanding their equipment facilities.

This amount, Splawn said, would be required if the railroads were to have an amount of equipment with a degree of newness similar to what they had in 1926. This estimate, he added, was approved by statistical experts of the ICC, and the Association of American Railroads.

Mr. Splawn, a former chairman of the commission, highly endorsed the principle of segregation of ICC duties embodied in the bill, stating that because of the present set-up, under which commissioners must share in all the administrative as well as rate-making duties of the commission, "we're breaking down two or three commissioners by putting too much of a load on them. It isn't good for them, and it isn't good for the country," he asserted.

He called the committee's attention to the endorsement which the Coolidge committee of 1932 gave to the principle of functional arrangement of the commission, and to the need for giving the commission more power to act affirmatively in transportation matters. The Coolidge committee, appointed at the depth of the depression to find what ailed the railroads, included former President Calvin Coolidge, Alfred E. Smith, and Bernard M. Baruch.

COMMISSIONER Splawn, whom members of the commission call "Doctor Splawn" because of his academic background, endorsed the bill's provision for depriving the government of land grant rate benefits which amount to about $7,000,000 annually of railroad revenue, not including postal items. He asked:

> The government has insisted that the railroads should not discriminate between shippers, so why should the government insist upon being a preferred shipper? For years the government has had the benefit of these lower rates and now that taxes are going up it is felt by many that it should forego this benefit.

Referring to the present railroad consolidation plan of the ICC, the commissioner said it was his opinion that if the plan were now fully in effect not all of the railroad mileage in the country would be in the red. The bill proposes elimination of this master plan with consolidations placed on a voluntary basis.

Representative Bulwinkle of North Carolina expressed concern over the bill's provision that the President should appoint members of the commission to specific divisions of the commission, a proposal endorsed by Mr. Splawn.

Considering the difficulty of calculating future railroad earnings in recent times, Commissioner Splawn did not think, he said, that the ICC had done such a poor job on railroad reorganization. The commissioner, who said he spoke only for himself and not for the ICC, said the Lea bill embodied "substantially everything" recommended by the ICC committee named by the President last spring to study the rail problem, and that it embodies "in part" the recommendations of the more recent "committee of six."

Chairman Lea said the ICC had been asked to study the bill and report its reaction with possible amendments. In view of President Roosevelt's recent suggestion that the FCC should be reorganized upon more effective lines, Washington observers are wondering whether there will be any one-man features in the proposed new regulatory set-up for that agency, favored by the administration.

The March of Events

Conflict over TVA Funds

THE Independent Offices Appropriation Bill, the first large regular supply bill of the session, was passed on February 8th by the House with an amendment which struck $17,392,977 from the allotment for the Tennessee Valley Authority. The Senate Appropriations Committee on February 17th restored the funds, indicating that the issue might finally be decided in conference.

The amendment eliminated funds for work on the Gilbertsville dam, for a dam project at Watts Bar on the Tennessee river, and for a survey of dam sites at Coulter Shoals. It constituted the renewal of a feud with the Senate, which the House lost last session.

Including appropriations and reappropriations, the measure as it went to the Senate provided $1,833,809,769 for independent agencies of the government. The larger amounts included:

Civil Aeronautics Authority, $21,218,000; Civilian Conservation Corps, $295,000,000; Railroad Retirement Board, $123,404,000; Rural Electrification Administration, $42,790,000; Social Security Board, $350,000,000; and the Maritime Commission, $100,000,000, with authority also to undertake contracts for an additional $115,000,000.

The bill was passed by a voice vote after three days of consideration. The amendment of Representative Faddis, Pennsylvania Democrat, cutting some of the TVA funds, produced the only real fight. The vote on adoption was 159 to 122, a number of Democrats passing through the tellers to join an almost solid bloc of Republicans in favoring the cut.

Bonneville Power Reserved

PUBLIC utility districts and cities in the Northwest recently called upon Administrator J. D. Ross for reservation of 215,542 kilowatts of Bonneville power—considerably more electricity than will be available from the Columbia river dam in the next two years. Under the Federal law, half of Bonneville's hydroelectric power must be reserved for such public agencies until January 1, 1941.

Twenty-two of Washington's 25 county-wide districts were moving to avail themselves of the preference, according to a release of the Bonneville publicity department, when the Bonneville chief disclosed he was accepting reservations for delivery of power over the broad transmission network planned for the area. A total of 202,431 of the 215,542 kilowatts was asked by the Washington districts for use by the end of 1940. Nearly all of the district commissioners called for delivery of power during the present year, as soon as the transmission lines are constructed and negotiations to acquire private distribution systems are completed.

Oregon public authorities have asked for 13,011 kilowatts, which is slightly more than 6 per cent of the total reservations of nonprofit agencies entitled to priority in the sale of Bonneville power. Tillamook and Wickiup—two of Oregon's four districts—requested 3,576 kilowatts. Seven cities in the state asked for a total of 9,535 kilowatts.

Representative Walter Pierce, Democrat, had previously said he would "oppose to the last ditch" sale of Bonneville dam power to private utility companies unless those companies guaranteed "to pass it on to the public at minimum rates."

Pierce's statement followed published reports that the Portland General Electric Company was negotiating with Bonneville Administrator Ross for a large block of the power soon to be made available at the government-owned plant.

Delay Seen for Colorado-Big Thompson

AN error in calculating the cost of the Green Mountain reservoir unit of the Colorado-Big Thompson project by Reclamation engineers and the loss of $1,000,000 of PWA funds, transferred to other projects by Administrator Harold L. Ickes, threaten seriously to delay progress on the $44,000,000 irrigation and power development, it was reported recently.

Clifford H. Stone, director of the state water conservation board, said the usually competent engineering staff of the Reclamation service underestimated probable cost of the Green Mountain unit, for which contracts had been let, by more than a million and a half dollars. Reclamation Commissioner John C. Page doubted the underestimate would be that large; he attributed the error to the haste with which the estimates had to be drawn to get the project before Congress in 1937 for approval.

Sponsors of the project learned recently that instead of $2,000,000 of PWA money allocated by Ickes last summer, it now has only $1,000,000, as the Interior Secretary and PWA Administrator transferred half of the original amount to other projects. Of the missing million, $400,000 went to the Seminoe dam power project in Wyoming for construction of transmission lines, which will eventually be linked in one system with those of the Colorado-Big Thompson power development, and the remaining $600,000 to the Tucumcari reclamation project in New Mexico as part of a $1,500,000 grant. Ickes' explanation was that the Colorado-Big Thompson project was not prepared to use the money. However, the Tucumcari project had not put it to use yet, and Stone believed there is a chance to get that much of it back.

To offset the loss of the $1,000,000, Colorado members of Congress were expected to ask Ickes to approve an increase of that much in the current budget estimate. They believed an additional million would permit construction to proceed on schedule during the next year.

Seeks to Aid Co-ops

SENATOR Norris, Independent of Nebraska, recently proposed a change in the Rural Electrification Act, declaring it should permit direct competition between farmer coöperatives and existing utilities. He said he would try to have it amended.

Norris said he confirmed his opinion by questioning Walter Meyne of Readlyn, Iowa, who appeared recently to testify on a farm bill. Meyne said farmers in his neighborhood near Waterloo could not get government loans to bring power to their homes because of a provision in the REA act.

Norris said opponents of the REA Act requested a provision barring government aid to farmer coöperatives in areas "already supplied with electric service." He said it was a compromise that should not have been in the act.

Power Rate Cuts Listed

NEARLY a score of Oregon and Washington communities will benefit from reduction in residential and commercial rates for electricity announced recently. The public utilities commissioners of Oregon and Washington announced the Pacific Power & Light Company would cut rates to save customers in the two states $200,000 a year, effective March 1st.

Oregon customers will save about $110,000 in Astoria, Bend, Hood River, The Dalles, Pendleton, Enterprise, and Heppner. Washington cities affected were Walla Walla, Yakima, Pasco, Kennewick, White Salmon, Goldendale, Dayton, Toppenish, Sunnyside, and adjacent communities.

Residential customers using 100 kilowatt hours a month will pay 8 per cent less for the electricity they use. Commercial customers will save from 9 to 20 per cent.

The city of Eugene moved into national prominence on February 1st by establishing a new rate schedule which brought its prices for commercial power below those of any other city.

The new commercial rate is lower than that of Tacoma, which previously was the lowest in the nation. Eugene also reduced residential rates, but left them slightly higher than Tacoma's.

J. W. McArthur, superintendent of the Eugene water board—operator of the municipal water and power systems—posted a schedule of 375 kilowatt hours of current for commercial lighting for $7.16 a month. This compares with $16.13 paid by Portland and Salem merchants, $10.38 for Tacoma's municipal plant, Spokane $16.10, Corvallis and Albany $22.75, Roseburg, Medford, and Klamath Falls, $21.25.

In establishing the new schedule, the Eugene water board anticipated delivery of Bonneville power by fall to care for increased consumption and peaks.

TVA Investigation Fund Approved

THE Senate on February 2nd voted to provide an additional $25,000 for the congressional investigation of the Tennessee Valley Authority. At the same time it agreed to extend the life of the joint committee to April 1st. The committee's life technically expired when this session began.

The House, which will pay half of the cost, must act on the extension before it becomes effective.

Engineers Oppose Hydro Project

THE Reclamation Bureau recently disclosed its engineers had recommended against immediate construction of a hydroelectric plant in Cabinet gorge of north Idaho. They contended, the bureau said, that a power development on the Clark Fork river would rob Grand Coulee, under construction in central Washington, of a potential market for its energy.

Reclamation Commissioner John Page said the engineers "suggested that it would be best to defer construction of the Cabinet gorge project until Grand Coulee power is absorbed."

Page forwarded copies of the engineers' report to Senator Clark and Representative White, Idaho Democrats, who criticized the engineers for their failure to investigate the irrigation phase of the project. Senator Clark stated:

"One of the most important features of the

Cabinet gorge proposal was that the power be used for the pumping of supplemental water onto farm lands in the Rathdrum prairie district of north Idaho. The engineers have failed to touch upon this in their report."

Clark said he would ask Congress to direct a study of the project from the irrigation standpoint and then "if the engineers continue to oppose the proposal" take steps to insure north Idaho farmers of an adequate supply of cheap power from Grand Coulee to carry out the supplemental water program.

Alabama

Injunction Denied

THE state supreme court on February 9th refused to enjoin the municipalities of Bessemer and Tarrant city from constructing electric distribution systems, using TVA power and operating in competition with the Birmingham Electric Company.

The state supreme court upheld Jefferson circuit court in dismissing the electric company's complaint. The company sought to restrain the municipalities "from engaging in unfair or unlawful competition" in distributing and selling electric energy in any of the territory it serves, and from issuing bonds to pay for the publicly owned systems.

Construction costs would be financed by the cities through Federal loans and grants.

Arizona

Ratification of Pact Urged

CONDITIONAL ratification of the Santa Fe compact was approved early last month by the Colorado River Commission, in a report submitted to members of the 14th Arizona legislature, in which it discussed legislation on the question and reviewed possibilities for usage of the river's waters.

The commission, in concluding a 21-page document on the river situation, said there was "everything to be gained and nothing to lose" in passage of Senator W. E. Patterson's bill calling for approval of the compact when and if a tri-state agreement is perfected for usage of the Colorado waters in the lower basin states.

The Patterson measure passed the senate by unanimous vote recently. The tri-state agreement condition for ratification calls for a pact involving Arizona, California, and Nevada for allocation of the waters to the three states.

Power-line Construction Assured

CONSTRUCTION by the Federal Bureau of Reclamation of a power transmission line from Parker dam, on the Colorado river, to Phoenix to supply electrical power to central Arizona was virtually assured early in February when Secretary of the Interior Ickes tentatively agreed to supply the power from Parker dam under a $9,456,000 project also calling for construction of a powerhouse and three large generators at the dam and a substation in Phoenix.

The agreement was reached between the Secretary and the Salt River Valley Water Users' Association, a project of the Bureau of Reclamation, and the Central Arizona Light & Power Company of Phoenix. It was announced by the president of the Salt River Valley Association that the transmission line would supply power for the separate use of both the association and the private utility company. He further stated it would make available a maximum of 50,000 additional kilowatts of electrical power to central Arizona. The estimated cost of the transmission line, Secretary Ickes said, is $1,300,000.

Max Pooler, manager of the Tucson Gas, Electric Light & Power Company, said Tucson also may be supplied with power from Parker dam. Pooler said negotiations with the Federal Bureau of Reclamation were under way to bring the power line on to Tucson at a cost which would be feasible for local use. In that event the local plant would be maintained as a stand-by unit.

Arkansas

Commission Appropriations

ADMINISTRATION forces on February 7th crushed efforts of Representative Smith of Randolph to eliminate substantial sums from the appropriation for the state department of public utilities. Smith and other anti-administrationists secured approval of amend-

ments to the $121,600 annual utilities commission appropriation reducing two items for travel expense and stationery, supplies, postage, telephone, and telegraph while the house was acting as a Committee of the Whole.

When the bill was taken up for action, however, Condrey of Sebastian and Brickhouse of Pulaski, aided by Blakemore of Logan and Tackett of Pike, succeeded in having the amendments rescinded. The bill passed, 77 to 11, as offered by the Budget Committee. While the bill was before the Committee of the Whole, Smith attempted vainly to amend it to reduce salaries of the commissioners from $5,000 to $4,000 a year, and to reduce salaries of other employees, as included in the bill.

California

Outlay of $20,000,000 Approved

SAN Francisco utilities budgets totaling more than $20,000,000 were approved by the city public utilities commission early in February. The first impression of fiscal experts of the commission was that the budgets of the commission, street lighting, airport, municipal railway, water department, Hetch Hetchy power and water supply, and the new electric power bureau would result in taxpayers shouldering $527,267 for the next fiscal year that they are not carrying this year.

Budgeted expenditures of the various utilities totaled $832,455 more than for the current year, but when duplications were deducted and offsets were made for charges against other departments, an official summary showed a net increase affecting taxpayers of $141,267.

Also affecting taxpayers was the estimate of water department revenues, reflecting a contribution to the general fund $386,000 lower than estimated for the current year. The net budget increase affecting taxes and the lowered water department contribution would add about 7 cents to the tax rate.

Chief budget increases were $190,080 for lighting streets and public buildings; $343,809 for the municipal airport, chiefly due to bond redemption; $550,652 for the street railway.

Delaware

Utility Loses Plea

THE U. S. Supreme Court on February 6th refused to interfere with an injunction ordering the Eastern Shore Public Service Company to remove its electrical facilities from the streets of Seaford.

The utility and the Pennsylvania Company for Insurance on Lives and Granting Annuities, trustee under one of the former's bond issues, appealed from the Delaware Supreme Court.

The utility told the court it had owned and operated the electric lighting facilties of the town since 1900. In 1936 the town council passed a resolution revoking the franchise of the company to use the public streets for poles and other fixtures.

Florida

Fight Recaptures Action

THE Florida Power & Light Company on February 6th filed a demurrer to three special counts in the $1,000,000 recapture suit filed recently by three special Miami city attorneys for the attempted recovery of $1,000,000 in alleged excess profits and accumulated interest.

The company obtained an order from Circuit Judge H. F. Atkinson staying argument on five common counts in the same suit until after arguments on the three special counts can be disposed of.

The order was obtained by John P. Stokes of counsel for the company and was agreed to by Marion E. Sibley, one of the three special attorneys employed by the city.

Indiana

Utility Tax Upheld

IN a ruling on a subject of current legislative interest, the state supreme court recently held that Ft. Wayne's municipal electric and water utilities must pay state and county taxes as provided by a 1933 law.

A bill removing such taxes from municipal

utilities, but providing they pay gross income tax, has passed the state senate. Another similar measure was said to be pending in the lower house.

The city won a suit to enjoin the county treasurer from levying the tax in the Allen circuit court. The treasurer, joined by the state tax board, appealed and the lower court was reversed.

The opinion, written by Judge George L. Tremain, of the supreme court, said the 1933 act, which specifically taxes that part of municipal utilities not used solely for governmental purposes, does not violate the constitutional tax exemption of municipal property. The constitutional exemption is a limit of what properties can be exempt from taxation, leaving the actual exemption within those limits up to the legislature. The supreme court held:

"There is no law that exempts municipally owned property simply because it is owned by a city or town. Property owned by the city and used as a proprietary business enterprise —that is, sale to consumers for a consideration—is regarded by the law the same as property owned by any individual or business corporation."

Maryland

People's Counsel Appointed

GOVERNOR O'Conor on February 5th announced the appointment of Joseph Sherbow, Baltimore attorney and adviser in his campaign for the governorship, to the $4,500-a-year job as people's counsel to the state public service commission, effective immediately.

Sherbow succeeded John F. Mudd, southern Maryland Republican, who resigned from the commission post since the November election.

Michigan

New Commission Created

GOVERNOR Fitzgerald by his signature gave approval last month to a bill ending the state public utilities commission and creating a new board to be known as the Michigan Public Service Commission. Immediate resignation by all five members of the public utilities commission would not prevent his signing of the bill abolishing the commission and their jobs, the governor said. The legislature finally gave the governor's bill its approval on February 9th.

He received on February 10th the resignation of Howell VanAuken, of Detroit. On February 16th, Chairman Paul H. Todd of the former commission threw the new law into the courts with an injunction suit testing its validity.

The principal difference in the new act is that the new commissioners will serve staggered terms, whereas terms of commissioners under the Utilities Act all expired at the same time. The new commission is specifically given jurisdiction over some of the newer utilities, such as pipe-line companies and some motor carriers about which there has been some doubt in the past.

Commissioners will get $6,000 a year instead of $7,000. Lawyers appointed to the commission are forbidden to practice any utility law during their tenure of office.

New York

Commission Reports on Municipal Survey

CONSUMERS of municipally owned electric utilities in New York state have saved more than $1,170,000 annually through rate reductions resulting from proceedings and negotiations initiated by the state public service commission since 1932, according to the results of a survey of municipal plant rates made by the commission.

The annual savings to customers of these municipal plants represent an average of about 9½ per cent of the operating revenue of the utilities. There are at present 51 municipally owned electric utilities in the state. Some of these plants had been established before the commission was created under the Public Service Law in 1907. About half the number now in operation were built within the past twenty-five years.

The commission recently completed the examination of the property and accounts of 12 municipal plants and determined the original cost of their property. These 12 plants accumulated from their inception to March 1, 1936, total earnings after paying all expenses, taxes, and interest, of $2,287,768 and turned over $1,097,027 of that amount to their operat-

ing municipalities. Four of these plants accounted for $1,766,546 of earnings of which they turned over $1,051,895.

The 12 municipal plants involved in the commission's study were those at Little Valley, Arcade, Andover, Wellsville, Tupper Lake, Marathon, Watkins Glen, Salamanca, Savannah, Delavan, Macedon, and Springville.

North Carolina

Special Act Applies to REA Loans

NORTH Carolina towns may secure money through the Federal Rural Electrification Authority for extending their electric power systems into near-by territory under the 1938 Revenue Bond Act passed at the special legislative session, in the opinion of Director Dudley Bagley of the state Rural Electrification Authority.

Bagley said recently that it was his opinion that the agency could lend money to the towns, without increasing their bonded debt and without having to hold elections. He explained the security to be pledged would be the income from the lines built. Heretofore towns have built from current revenues, he said, and cited 22 which built 1,165 miles of lines at a cost of $856,840 since 1935 to serve 6,205 customers. He commended the towns' progress in the work.

Attorney V. D. Nicholson of the Federal REA has said that more than $2,000,000 would be available for rural lines in North Carolina.

Ohio

Cleveland Asks Rehearing

CITY of Cleveland on February 8th filed with the state public utilities commission an application for rehearing on the commission's recent ruling granting the East Ohio Gas Company a rate increase. While the city hopes for the requested rehearing, the application also was designed as the basis of an appeal to the state supreme court in the event the rehearing is not granted.

Among the reasons given by the city for believing the state commission in error were the commission's failure to force refunds to large consumers whose rates were lowered instead of raised; and a charge that the commission arrived at the estimated revenue under the lower city ordinance rate solely by arithmetic and without any judgment allowance for increased volume and revenue which might follow a reduction in rate, as originally sought.

Purely as a technical move to protect itself in the event the city appeals to the supreme court, the East Ohio Gas Company also filed an application for rehearing on the same date, the application covering those matters in which the East Ohio was not given what it asked by the state commission.

Oregon

First District Bill Offered

THE so-called people's utility district bill, which has been a bone of contention since early in the legislature, was introduced in the state senate on February 2nd. Affixed to the bill were the names of Senator Lyman Ross, and several other members of both houses.

Senator Ross said another companion bill setting forth the taxation procedure for the utility districts would be introduced later.

Ross' bill provides that the first issue of revenue bonds must be submitted to voters of the district in which the bonds are issued. After that, the board of directors may issue revenue bonds without referring their action to the voters. Funds attained through sale of the bonds would be paid from revenues accruing to the district through its sale of water, water power, and electric energy.

Pennsylvania

FPC Denies Rehearing Petition

THE Federal Power Commission, after consideration, recently denied the petition filed January 6, 1939, by H. Jerome Jaspan for a rehearing on his complaint against the Philadelphia Electric Company charging that it is selling electric energy to the Delaware Power

& Light Company at a rate below cost of production.

On December 3, 1939, the commission dismissed without prejudice Mr. Jaspan's complaint, on a finding that the record made by the complainant at a hearing held on September 15, 1937, did not sustain the allegations, and that a preliminary investigation undertaken by the commission, upon its own motion, into the matters complained of did not show the appearance of any reasonable ground for, or that the public interest would be served by, further investigation and inquiry.

State Dam Policy Assailed

A RENEWED attack on Governor Arthur H. James' opposition to Federal flood control policies was launched in the state house of representatives when Representative J. Holland (D., Pittsburgh), demanded recently that the governor coöperate in the Federal program for western Pennsylvania.

Charging again that Governor James disapproves the Federal program because of fear that proposed flood control dams may be used for generation of electric power, Mr. Holland told the house: "The governor has no right to disregard the loss of life and property in floods in Pennsylvania to repay a political debt."

Meanwhile, Secretary of Forests and Waters, G. Albert Stewart, the governor's official in charge of flood control plans, said the administration's policy—opposed to giving the Federal government outright control of flood control dams—has not halted any projects. He said:

"We hold no brief for the power companies, but we are not unmindful of the fact that the development of water power in western Pennsylvania would constitute a body blow to western Pennsylvania's major industry—coal—employing tens of thousands of men."

Governor James has cited the lack of assurances from the Federal government on the purposes of the flood control dams. Federal plans call for construction of a total of 10 flood control dams for the protection of Pittsburgh and other communities down the Ohio valley.

Electric Rates Reduced

THE state public utility commission on February 7th ordered the Philadelphia Electric Company to put into effect a temporary $1,650,000 yearly rate reduction, effective March 1st. It will benefit 670,000 light and power consumers in Philadelphia, Bucks, Delaware, Montgomery, and Chester counties, and will remain in force for a trial period of six months, unless extended.

The reduction was the second ordered by the state commission since it began an investigation into the electric company's rates on its own motion in August, 1937. On November 1, 1937, the commission required the company to file a new tariff effecting a temporary reduction of $3,107,000 a year. That reduction, which was not contested, became permanent on May 1, 1938.

Commission Slashes Budget

THE state public utility commission on February 8th lopped 247 employees off the payroll. Governor James forced the slash by holding up the pay checks of all of the commission's 777 employees, including the four sitting commissioners. The dismissals were voted at a stormy executive session, and over the protest of Commissioner Buchanan.

Commissioner Buchanan asserted the firings "greatly hinder, if they do not actually strangle, the operations of the present commission, and to a large extent will nullify investigations which the commission already has instituted and upon which it has spent large sums of money."

The governor rejected the commission's first two budgets as "unacceptable," and approved the third budget submitted for January and February only. It reduced expenses for the biennium ending May 31st, $135,486 below the amount appropriated by the 1937 legislature.

South Carolina

Company Told to Reduce Charges

A $200,000 reduction in the rates charged electric and gas customers of the South Carolina Electric & Gas Company was announced on February 11th by H. W. Scott, chairman of the state public service commission. The new and lower rates were ordered into effect on all bills rendered on or after February 27th.

The reduction was said to be the first result of a long study the state commission has been making of the company's charges. The order made it clear that the study had not been completed and it was indicated that further results may follow.

Last October the commission ordered a reduction amounting to approximately $500,000. From this order the company appealed for a rehearing and the order was not placed into effect. A series of conferences followed, and the recent reduction was said to be a result of the hearings.

It was estimated that more than 90 per cent of the electrical customers would receive some reduction. The minimum customer, or the

customer using the minimum amount under the schedules of the company, will continue to pay 75 cents for 11 or less kilowatt hours per month.

Tennessee

Memphis Deal Approved

THE city of Memphis and the Tennessee Valley Authority on February 16th bought the Memphis Power & Light Company's electric and gas properties for $17,360,000—$767,000 less than was offered in January, and $3,640,000 less than the utility originally demanded.

The city will pay $15,250,000 and the TVA $2,110,000, according to a formal statement from the municipal light and water board.

Besides the electric and gas facilities, properties in the transfer included a large office building, one large generating plant, and some real estate. The company retained another generating plant, and will operate it as a standby "to insure the maximum of service to the city under an agreement between themselves and TVA," the statement said.

Principal negotiators of the contract were Joseph Swidler, assistant general counsel for the TVA; Paul B. Sawyer of New York, president of National Power & Light which controls Memphis Power & Light, and the members of the municipal light and water board, Tom H. Allen, I. J. Lighterman, and W. W. Mallory.

While there was no immediate mention of Memphis Power & Light securities, W. J. O'Brien, president of the company, said in December that at that time there were outstanding bonds, preferred stock, and common stock "representing an investment of $22,876,000."

The deal completed a clean sweep for TVA in the four major Tennessee cities—Memphis, Chattanooga, Knoxville, and Nashville. A Knoxville deal was negotiated last fall and recently the authority and Commonwealth & Southern Corporation came to terms at $78,600,000 for Commonwealth & Southern's Tennessee Electric Power Company, serving Nashville, Chattanooga, and scores of smaller cities. The Memphis price was said to be about the same as the company's rate base.

Texas

Reports on Flood Control

A STATE senate committee recently urged the legislature to draw a line between flood control and power production for the benefit of Texas river authorities and districts.

The group which investigated the operation of Lower Colorado River Authority dams in the flood of last July said its reams of testimony showed the two purposes were so antagonistic that it was "impossible for a dam to serve both purposes with any degree of efficiency if the purposes are considered of equal importance."

It did not specifically answer the question of responsibility in the control of Buchanan dam gates in the flood. Instead, it said the LCRA was negligible only if its policy was to operate its dams primarily for flood control. There was no negligence, the committee added, if the authority's policy was the generation and sale of hydroelectric power, since large reserves of water are necessary for such purposes on a stream as variable as the Colorado. The report said:

"We do not deem it within the province of this committee to make specific recommendations as to what that policy should be."

The report was signed by T. J. Holbrook of Houston, Wilbourne Collie of Eastland, and Albert Stone of Brenham. The committee was named by the last legislature and has been replaced by a similar group with equal powers by the present legislature.

Members said they believed the magnitude of programs such as the LCRA was so great and affected so many persons that the legislature should immediately formulate a state policy for their operation and "provide for the strict observance of such policy by the enactment of necessary laws and the designation of proper agencies for their enforcement."

Refuse to Call Power Plant Election

ON the ground that it would serve no useful purpose, the Fort Worth city council recently refused to call an election on municipal ownership of the electric and gas distributing systems.

Petitions demanding such an election be called were presented months ago by Karl Crowley, representing himself and other taxpayers, he said.

The council's action followed a report from the city legal department which doubted the usefulness of calling the election. The council's negative vote was unanimous. The city

attorney set forth the council already has power to purchase light and gas plants and mortgage the franchise and income to finance their acquisition, as would be sought by charter changes proposed as part of the municipal ownership drive the petitioners demanded.

City Attorney R. E. Rouer pointed out home rule cities were given the right by the 43rd legislature to purchase or construct their own utility systems in case that appeared desirable.

West Virginia

Carmody's Policies Attacked

DIFFICULTIES encountered by rural electric coöperatives in West Virginia were blamed largely on John M. Carmody, administrator of the Rural Electrification Administration, in a letter addressed to Clifton A. Woodrum, chairman of the committee on independent offices at Washington by the state public service commission.

The letter was in reply to statements made by Carmody recently when he appeared before the House committee on the REA request for $2,700,000 during the next year. At that time Carmody asserted that he was "amazed" that "two or three electrification projects" in West Virginia "could survive at all in such unfriendly atmosphere."

Differences between the Federal REA and the state commission were said to have existed for the past two years. The letter stated:

"The public record refutes Mr. Carmody's statements and inferences. If Mr. Carmody expected this commission to be friendly to or favor his utilities, we can understand his reasons for feeling somewhat chagrined when he found it to be unprejudiced, civil, and fair. The public service commission of West Virginia would be untrue to its trust should it favor any utility."

The contention of the REA was that power coöperatives were not subject to commission rulings, because they were not utilities. The commission maintained that coöperatives are utilities and, therefore, required to obtain a certificate of convenience and necessity. Of four applications for such certificates, three were granted by the commission and the fourth, that of the Barbour County Power Company, dismissed by order of the company.

The commission said its chief concern "was to secure electric service to rural inhabitants at the earliest possible date and at the lowest possible cost. The delay in getting the service to rural inhabitants in Harrison and Hardy county was caused by Mr. Carmody's ignoring the statutory requirements and defying the law of this state in refusing to apply for the required certificate until forced to do so after more than a year's time."

An REA reply, inserted in the *Congressional Record* along with the letter by Chairman Woodrum, said that Carmody had asserted "there were a great many things which could be pointed out in reply to Messrs. Preston, Nethken, and Mahood."

Wisconsin

Co-ops Seek Tax Uniformity

RURAL coöperative delegates, meeting in Madison on February 9th, selected an executive committee to obtain a uniform method of taxation for all electric coöperatives in the state.

Attorneys, called by the Wisconsin Development Authority at the suggestion of co-op leaders, recommended taxation on the same basis as private utilities or taxation on the basis of gross income, similar to mutual telephone company assessment, as alternative methods to be sought through legislative action.

Present tax valuation of electric co-op lines is made by tax assessors in the vicinity, and the WDA said research showed current taxes were higher per person on any basis of comparison than those of municipal and private utilities.

Louis J. Altkrug, attorney of the Federal REA, said Wisconsin electric coöperatives are paying higher taxes than those in any other state.

Seaway Resolution Blanketed

A RESOLUTION introduced in the state senate on February 10th memorializing Congress to enter into a treaty with Canada for construction of the St. Lawrence deep-waterway was referred to the Committee on Legislative Procedure, the so-called "graveyard," despite objections of the author, Senator Philip E. Nelson, Progressive.

Pointing out that all three political parties favor the proposed seaway, Nelson asked that his resolution be sent to the Committee on State and Local Government for public hearing. Senator E. J. Roethe, Republican, objected and Senator Nelson's motion was lost, 15 to 12.

Majority forces have insisted that all memorials to Congress be referred to the Committee on Legislative Procedure.

The Latest Utility Rulings

Right of Utility Corporations to Merge In the Absence of Public Detriment

THE much debated question whether public utility corporations have the right to merge when the merger will not adversely affect the public interest has been answered by the supreme court of Pennsylvania in a decision holding that the commission had acted arbitrarily and unreasonably in refusing to allow the Northern Pennsylvania Power Company to sell its franchise and property to Metropolitan Edison Company and thereby to bring about a merger.

The court held that the Northern Company had the right to sell its property unless it was established by competent evidence that the sale would adversely affect the public in some substantial way. The free alienation of property, it was said, is an inherent right of the owner under our customs, law, and Constitutions, subject only to restraint if against the public interest.

The regulatory commission, in the view of the court, is not a "superboard of directors for the public utility companies of the state and it has no right of management of them." Its sole power is to see that in the matter of rates, service, and facilities, its treatment of the public is fair. Schaffer, J., speaking for the court, made the following statement:

> The merger is in the exercise of a power vested in corporations by the general assembly. The commission admits, as it is bound to admit under the evidence, that the merger would be to the advantage of the two corporations, would reduce expenses, and immediately inure to the benefit of their stockholders. The commission apparently seems to think that stockholders are no concern of its, but they are of concern, because if their company is financially strengthened, its public service can better be rendered. It would seem that the merger is denied largely on the ground that it will not result in the *immediate* reduction of rates and, therefore, is not in the public interest. This is not a proper ground for the commission's refusal. If it were, no long-term plan looking to ultimate reduction of rates could be set in motion. The approach of the commission to the approval or disapproval of the merger is erroneous in principle, because the question of merger is one of internal management, unless evidence heard by the commission discloses that the merger would adversely affect the public. The only question before the commission is whether it does so adversely affect, and where the testimony establishes, as it does here, that the merger would not adversely affect the public interest, the power of the commission over the merger vanishes.

Northern Pennsylvania Power Co. et al. v. Pennsylvania Public Utility Commission.

Duty of Motor Truck Operator to Pass Picket Line

A CARRIER, it was held in Washington, is not relieved from the obligation to furnish service even though it may be necessary to pass a picket line established by a labor union. The commission ruled that the carrier in order to relieve himself of liability for failure to serve must show further that he has made every reasonable effort to secure drivers who are willing to go through the picket lines when his own employees fail to do so. The commission declared:

> Individuals and unions who accept employment in public service enterprises must govern themselves accordingly and recognize that their rights and duties are somewhat different from those of men engaged in purely private businesses.

Motor carriers summoned before the commission because of their failure to furnish service to a hotel which was being picketed attempted to excuse themselves by referring to a tariff provision that they would not be bound to pick up or deliver freight at locations where it was impracticable to operate on account of highways, roads, streets, or alleys, or because of riots or strikes, or when loading or unloading facilities are inadequate. The commission did not agree that this relieved them of their obligation to serve. This interpretation, it was said, was at variance with the meaning the commission had in mind when the tariff rule was promulgated. Furthermore, it was said:

> To rule with the carriers would be tantamount to serving notice on the shippers and the public that their primary right to the free and unobstructed flow of commerce must be sacrificed to the timidity of carriers and to the desires of labor leaders who may be maneuvering for tactical advantages in an industrial battle to which the carriers and their employees are not even direct parties.

In view of the fact that this was a test case and that the carriers were again delivering and picking up freight, although they were not sure "how long the union officials would permit it," the commission did not consider it necessary to cancel the operating permits. It was believed that the purposes of the action could be served by suspending the permits but permitting such suspensions to be inoperative during continued compliance with the law and the commission's order to serve, and by assessing reasonable monetary penalties in proper proceedings as authorized by law. *Davenport Hotel, Inc. v. Consolidated Freight Lines, Inc. et al. (F. H. No. 7191).*

Commissioners Not Liable for Damages Resulting from Grade Separation

MEMBERS of a commission, acting in the performance of a public duty and under a public statute, are not personally liable in a civil action for damages arising out of their acts, provided what they do is done in good faith, according to a ruling of the supreme court of New Jersey. This decision was made in a case where a landowner sued the members of the New Jersey commission, with others, to recover damages resulting from a change of grade of a highway incident to a railroad grade separation project.

The court found that the state had not consented to be sued, and it was said that in the performance of its statutory powers and duties the board of public utility commissioners was an *alter ego* of the state, and as such could not be sued legally as a separate entity or body. *R. & A. Realty Corp. et al. v. Pennsylvania Railroad Co. et al. 3 A. (2d) 293.*

Gas Utility's Petition for Rate Increase Disapproved

A GAS utility's petition for a rate increase was disapproved by the Montana commission on the ground that a gas customer need pay only a reasonable rate. The utility had not used its funds for the purposes intended by law and desired to increase its rates in order to secure funds to repair its plant and put it in shape for efficient operation.

The commission, in limiting directors' fees as a proper item of operating expense, said:

> While it is ordinarily held that a director's fee is a proper item of operating expense (New York & Richmond Gas Co. *v.* Prendergast, 10 F. (2d) 167, P.U.R. 1925E, 19), nevertheless we do not believe that directors' fees should be unreasonable. It should be remembered that the business of the utility is for the benefit of its stockholders and it is they who are entitled to a fair

return on their investment. To allow a stockholder an unreasonable fee is to give him more than a fair return on his investment. To this he is not entitled. Here the utility pays salaries for taking care of and managing the utility. There is no reason why the directors should meet once or twice a month and charge the utility for their services.

The commission also felt that a public utility cannot pay dividends to its stockholders with the money that should have been kept in the depreciation fund and at the same time claim a return upon its book value.

This utility had figured depreciation at the rate of 10 per cent. The commission said with respect to this matter:

> Whether or not this utility should be allowed depreciation on its property at the rate of 10 per cent cannot be ascertained at this time. The allowance for depreciation should be based upon the actual value of the property and not upon its original cost, as here, or upon the gross revenue of the utility. We feel that the amount to be determined for depreciation is not covered by any fixed rule, but can only be determined after careful examination of the property and the nature of its use. The past experience of the utility in this regard should be taken into consideration. In determining what rate of depreciation should be used, the means employed by an accountant is not in itself sufficient since at no time should the rate determined for depreciation result in the accumulation of a surplus beyond the reasonable requirements of the utility. At all times depreciation should be figured at the rate which is continuing and at no time should it be fixed in order to remedy excessive rates of depreciation which were in effect in the past.

Finally the commission refused to grant the rates which the gas utility was requesting, since the affairs of the utility were in such shape that it could not be determined with reasonable accuracy whether or not the rate increases were just and reasonable and it considered the rate and manner of charging depreciation to be unreasonable.

The commission, in conclusion, said that it had the duty not only to approve or disapprove utility rates, but also to see to it that the utilities conform to rules and regulations and adhere to proper accounting practices. *Re Big Horn Oil & Gas Development Co. (Docket No. 2548, Report and Order No. 1736).*

Charge for 3-phase Electric Service under Unfiled Rule Held Discriminatory

An electric utility company was ordered by the Pennsylvania commission forthwith to file with the commission as part of its tariff all rules, regulations, and practices in conformity with the provisions of the Public Utility Law and to refund to a customer an amount collected for supplying 3-phase electric service. Collection of this charge, without the authority of any filed rule, was held to be unreasonable and unjust discrimination. It appeared that the company had supplied such service to others without collecting a similar charge.

The company admitted that it had a printed booklet of "service rules" and regulations affecting rates and tariffs, but denied that the booklet contained any rates or prices or any rules pertaining to rates and prices, and asserted that all rules and regulations affecting or involving rates and tariffs were on file with the commission. A tariff filed by a predecessor company referred to a booklet prepared for the use of architects, contractors, and builders. A filed tariff stated that the company reserved the right to refuse the supply of service to single-phase, 110-volt motors of individual rating in excess of ¾ horsepower and to polyphase installations aggregating less than 5 horsepower. The company took the position that some rules could not be made definite and specific and meet all conditions of operation. The commission said, however:

> Respondent's statement (Commission Exhibit No. 1) in support of its rights to have rules, of which the commission has no knowledge, to be enforced or suspended by it as may suit itself, is subversive to the principle of regulation as contemplated by

the Public Utility Law to prevent unreasonable injustice and intentional discrimination. Under respondent's practice, no one can know, not even respondent, as to what its decision in any particular case will be. The application by respondent of these unfiled rules is optional and not compulsory. Enforcement by respondent of rules and practices that require the payment by one customer of a greater sum than it requires of other customers for similar service under similar conditions, regardless of whether the total payments are made to respondent or divided between respondent and others, constitutes unjust discrimination.

Henry v. Pennsylvania Edison Co. (Complaint Docket No. 11679).

Illegal Motor Carrier Operation Not a Basis For Exemption under Federal Act

THE United States Supreme Court upheld a circuit court decision in favor of the members of the Texas commission in a suit by a motor carrier to restrain interference with its operation over state highways in interstate commerce. The carrier rested its case on the contention that it had been operating over Texas highways in interstate operation prior to June 1, 1935, and was therefore exempt from state regulation under the provision of the Federal Motor Carrier Act allowing continuance of operation by motor carriers engaged in bona fide operation on that date over routes for which application for a certificate was made before the Interstate Commerce Commission. The statute provides that the commission shall issue the certificate under such circumstances without requiring further proof that public convenience and necessity will be served.

The carrier's claim of exemption was rejected on the ground that it was not engaged in bona fide operations. It had applied to the state commission for a certificate in 1934 and this certificate had been denied. A state court had sustained the commission. Thus it appeared that operations had been without authority of the Texas commission. Mr. Justice Butler spoke for the Supreme Court:

> The expression, "in bona fide operation," suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a state in defiance of its laws.
>
> As petitioner is not protected in his operation as a common carrier by the proviso, we need not consider to what extent, if at all, the Federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner.

McDonald v. Thompson et al.

Assignment of Carrier's Permit Refused

AN application for approval and consent to the assignment and transfer in part of a common carrier certificate was dismissed by the Massachusetts Department of Public Utilities on the ground that there was no need for such service as would be effected by the proposed transfer.

The department said that under the statute the granting of approval and consent to the assignment and transfer, in whole or in part, of any certificate from one carrier to another, is discretionary with the department, left so by the legislature because of the many important factors, apart from fitness, willingness, and ability of the transferee, that enter into proper regulation of a business declared to be affected with a public interest.

The routes sought to be transferred are for operations between fixed termini with several duplications of intermediate

stopping points and traffic movements that closely parallel each other over much of the way even where they do not travel over identical highways. The department, in dismissing the application, said:

> To thus allow the refabrication of two common carrier certificates from a separation of routes granted to the holder of a common carrier certificate upon the representation that he intended to operate and did operate over said routes a single common carrier service, would be to defeat the purpose of the general court in enacting the motor carrier law. We are of opinion that the authority vested in this department by §11, to approve and consent to a partial transfer of such facilities, should be exercised with caution and only in cases where a portion of a route required to be served and not otherwise adequately provided with common carrier facilities, is assigned or transferred by the holder of a certificate.

The department said that in any event, before deciding to approve such an application as the one before it, they ought to be satisfied, from the evidence presented, that public convenience and necessity require the services of another common carrier, before passing upon fitness, willingness, and ability of the transferee to perform. The evidence presented did not authorize such a finding. *Re Lennerton (Common Carrier Certificate No. 527-A).*

Grade Separation Order Cannot Award Damages to Utilities

THE Pennsylvania commission dismissed petitions of public service companies demanding modification and clarification of an order providing for elimination of a grade crossing. This order had provided that any relocation of adjacent structures or other facilities of any public service company which might be required as incidental to the elimination must be made by such a company at its own expense.

The protestants felt that the order should provide for compensation to the utility companies where they were compelled to remove or relocate facilities located on private rights of way. The commission said:

> Under both the former Public Service Company Law and the present Public Utility Law, the commission is vested with power not only to order grade-crossing eliminations and appropriate property therefor, but also to award damages for property taken in the proceeding. These functions are separate and distinct, however, . . . Both the law and the present act require a separate proceeding to determine damages.

Where an application for such damages has been transferred to a state court, said the commission, that court must determine whether the public utility is entitled to damages within the purview of the statutes governing this matter. The commission disclaimed any intention by its original order appropriating property for the crossing to bar any recovery by the present petitioners for damages caused by necessary relocation of facilities from private properties. Nothing more was intended by the order than a reference to the then existing statute and compliance therewith. The aggrieved parties might appeal from a determination of the court denying them any recovery. *Re Butler Water Co. (Application Docket No. 49870, Complaint Docket No. 11216).*

Choice between Applicants for Operating Authority

THE supreme court of Ohio affirmed an order of the commission denying an application of the Lorain Motor Coach Company for rehearing of an order of the commission denying that company's application for a certificate of convenience and necessity.

Two transportation companies had ap-

plied for a certificate of convenience and necessity, one application being granted. The appellant contended that the commission erred in granting the certificate without proof that existing transportation service is inadequate and without giving to an existing operator an opportunity to provide adequate service. The court said that this is still the law which may be invoked by a common carrier operating over a route but that it does not apply in a proceeding in which both applicant and protestant are not operating over the route sought but are original applicants for a certificate of convenience.

The court declared that it had consistently affirmed orders of the commission, selecting between applicants for a certificate, when it did not affirmatively appear from the record that the orders were unlawful and unreasonable. *Lorain Motor Coach Co. v. Public Utilities Commission.*

Other Important Rulings

THE supreme court of Indiana held that the operator of a motor vehicle used in hauling commercial fertilizer and ground and crushed limestone used as fertilizer from fertilizer plants or quarries to farmers was not exempt from obtaining a carrier's permit or certificate from the public service commission. The court refused to sustain a contention that agricultural commodities exempt from such regulation included fertilizer. *Stiver et al. v. Holley, 17 N. E. (2d) 831.*

The Pennsylvania commission, in an investigation of a taxicab company, expressed the opinion that in the case of fixed capital having relatively short life, such as taxicabs, the original cost basis less accrued depreciation should be used as the rate base, allowance being made for the working capital requirement of the corporation. *Public Utility Commission v. Lackawanna Taxicab Co., Inc. (Complaint Docket Nos. 11473, 11474).*

The Federal Communications Commission, in denying authority to the city of Seattle for the construction of a coastal harbor radio-telephone station, where existing radio-telephone facilities had not been shown to be inadequate and a substantial public need for the proposed service had not been shown, said that the commission's duty is to determine the public interest, convenience, or necessity from a viewpoint of the country as a whole. Therefore, service to the public in general and not the incidental advantages or disadvantages to a particular applicant must be the controlling factor in the determination of the merits of an application. *Re City of Seattle (Docket No. 4832).*

The Federal Communications Commission declared that the granting of applications so as to provide a fair, efficient, and equitable distribution of radio service to each of the communities in the United States is to be governed by the sound discretion of the commission and cannot be limited by private contracts or agreements between licensees of radio broadcast stations or applicants therefor. *Re Agricultural and Mechanical College of Texas et al. (Docket Nos. 4928, 5011).*

The Federal Communications Commission held that a construction permit for a radio broadcast station should be denied where there was satisfactory primary radio-broadcast service from an existing station, no satisfactory showing was made to substantiate the alleged need for additional service, and there was nothing in the record substantially challenging the adequacy of the existing service. *Re Andersen (Docket No. 5028).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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(279 N. Y. 304, 18 N. E. (2d) 287.)

Courts, § 19 — Representative form of action — Complaint against charge.

1. Courts may entertain jurisdiction of a suit brought by a customer in a representative capacity asking that a public utility be restrained from charging for restoration of service temporarily discontinued and asking for a declaratory judgment and an accounting, since the remedy provided by Public Service Law, § 71, is not exclusive, p. 356.

Appeal and review, § 68 — Remand — Statutory interpretation.

2. Courts need not send one seeking to enjoin a gas utility from collecting a charge for restoration of service temporarily discontinued back to the Commission to get its interpretation of the term "service charge" as used in Public Service Law, § 65 (6), since that is a question of law and the Commission has only such judicial power as is incidental to the exercise of its other powers, p. 356.

Parties, § 3 — Representative form of action — Complaint against charge.

3. A representative form of action is proper when a customer sues in his own behalf and in behalf of all other consumers similarly situated asking that a gas utility be enjoined from charging for restoration of service temporarily discontinued and for a declaratory judgment for the benefit of those who may be subject to the charge in the future, p. 357.

Parties, § 3 — Representative form of action — Complaint against charge.

4. A representative form of action is improper when a customer who has not paid but who is threatened with a charge for restoration of service temporarily discontinued by a gas utility, sues in his own behalf and in behalf of others similarly situated asking for an accounting to those who have paid such charges, since to maintain a representative action the plaintiff must show that he has a cause of action and that he is representative of a common or general interest, p. 357.

Rates, § 312 — Service charge — Restoration charge — Legality under statute.

5. A charge made by a gas utility for restoration of service temporarily discontinued is a "service charge" within the prohibition of Public Service Law, § 65 (6), which prohibits a charge or fee for service or for the installation of apparatus or the use of apparatus installed, p. 357.

[December 9, 1938.]

NEW YORK COURT OF APPEALS

APPEAL from decision of Appellate Division reversing on the law a decision of the Special Term which dismissed complaint and denied the motion in suit to enjoin gas utility from making a charge which plaintiff calls a service charge and claims is illegal; affirmed. For decision by Appellate Division reversing the judgment of the Special Term, see (1938) 253 App. Div. 635, 23 P.U.R.(N.S.) 393, 3 N. Y. Supp. (2d) 581.

APPEARANCES: Jackson A. Dykman, of Brooklyn, for appellant; Israel Beckhardt, of New York city, for respondent.

HUBBS, J.: This is a representative action brought by the plaintiff in behalf of himself and all others similarly situated to restrain the defendant from making a charge which the plaintiff calls a service charge and claims is illegal.

On June 5, 1936, the plaintiff requested the defendant to discontinue the gas service at his home, and the defendant sent a man who shut off the gas by locking the meter. At plaintiff's request, the defendant on September 9, 1936, turned on the gas and charged him $1 for the reconnection.

Section 65 of the Public Service Law (Consol. Laws, Chap. 48), subdivision 6, provides:

"6. *Service charges prohibited.* Every gas corporation shall charge for gas supplied a fair and reasonable price. No such corporation shall make or impose an additional charge or fee for service or for the installation of apparatus or the use of apparatus installed."

In his complaint herein plaintiff asks for an injunction restraining the defendant from collecting the charge made as above stated; that the defendant be required to account to all those from whom it has collected a like charge; for a declaration of the rights of the parties; and for such other and further relief as may be just and proper. Plaintiff has not paid the charge but the defendant continues to bill him for it and threatens to turn off the gas unless it is paid.

The special term dismissed the complaint on the ground that the plaintiff should have proceeded under § 71 of the Public Service Law. The appellate division reversed on the law, holding that a representative action is proper and that the charge comes within the prohibition of the statute, being a service charge. The appellate division certified to this court the question: "Does the complaint state facts sufficient to constitute a cause of action?"

We are required to determine whether the plaintiff has sought the proper remedy, whether in any case he can bring a representative action and whether the charge is a "service charge" within the prohibition of the statute.

There is no doubt that the usual practice, and the one to be encouraged, is to file a complaint with the Public Service Commission and, if its order be deemed improper, to cause the order to be reviewed by certiorari. In the instant case the plaintiff with others similarly situated to the total num-

ber of twenty-five might have instituted a proceeding before the Commission for investigation of the charge made by the defendant, which would have required action by the Commission. Public Service Law, § 71. Plaintiff states in the complaint that he has requested the Commission to make an investigation but that the request has been refused. We are required to decide whether the proceeding before the Commission, provided for by § 71, is exclusive, or whether it is permissible to seek relief in other ways and for other remedies.

In a number of similar cases the courts reviewed by certiorari the questions of law involved. None of them, however, is authority for holding certiorari to be the exclusive remedy.

In Leitner v. New York Teleph. Co. (1938) 277 N. Y. 180, 189, 24 P.U.R.(N.S.) 289, 294, 13 N. E. (2d) 763, 767, it was claimed that the defendant, acting on a rule which it had adopted, unreasonably refused to install a public telephone. It was decided that in order to determine the reasonableness of the rule resort must first be had to the Commission. Plaintiff contended that the rule adopted had been unreasonably applied. The court stated: "As to whether rules of a public utility duly promulgated were by it so [unreasonably] applied is open for decision in the courts, but the question of the reasonableness of the rule can be attacked only before the Public Service Commission." See, also, People ex rel. Linton v. Brooklyn Heights R. Co. (1902) 172 N. Y. 90, 64 N. E. 788. Those cases, which involved an application for an order of mandamus, do not hold that certiorari is the exclusive remedy. They go no farther than to hold that where the reasonableness of a rule is questioned, or where there is claimed to exist an abuse of discretion by railroad directors, or where other remedies are adequate, mandamus will be denied. In the Leitner Case, however, the court intimated that where the only question is whether a rule admittedly reasonable was applied in a discriminatory manner equity will take jurisdiction. This is another way of saying that where only questions of law are involved direct application for relief may be made to the court.

In Murray v. New York Teleph. Co. (1915) 170 App. Div. 17, 156 N. Y. Supp. 151, affirmed (1919) 226 N. Y. 590, 123 N. E. 879, the plaintiff sought an injunction which was denied. The court in its opinion placed its decision on the ground that where the there was no strictly contractual right to be enforced resort should be had to the Commission. It stated: "The trend of the decisions is well evidenced in the case of Pennsylvania R. Co. v. Puritan Coal Mining Co. (1915) 237 U. S. 121, 131, 59 L. ed. 867, 35 S. Ct. 484. There the court pointed out that where attack was made upon the tariff filed, the Commission had the exclusive jurisdiction; while, when the attack is made upon the manner of the application of the tariff, as where it is charged that it is applied in a discriminatory manner, then the matter is for the courts to adjudicate, rather than the Commission." (170 App. Div. at p. 25.)

An injunction was denied in New York State Electric & Gas Corp. v. Maltbie (1935) 266 N. Y. 521, 195 N. E. 182, where the company sought

to prevent the enforcement of an order of the Public Service Commission on the ground that the plaintiff should have applied for a review by certiorari of the order of the Public Service Commission. That case is distinguishable from the present case, as in that case there was an order in a proceeding before the Commission to which the company was a party, and it could have reviewed the order by certiorari, the usual practice instead of instituting a new action. In the present action the plaintiff was not a party to the order fixing the rate, and thus he has not abandoned one method of review by seeking another.

Where the only question involved is the power of the Public Service Commission to fix rates relief will be granted in the form of a writ of prohibition. Niagara Falls v. Public Service Commission (1920) 229 N. Y. 333, P.U.R.1921A, 39, 128 N. E. 247. Various other remedies have been granted. In Pennsylvania R. Co. v. Puritan Coal Mining Co. *supra,* the action was for damages for failure to furnish cars to plaintiff during a strike. The company had adopted a rule providing that it would furnish cars on the basis of mine capacity. The court held that the plaintiff had properly brought an action at law without resort to the Interstate Commerce Commission because it was not attacking the rule. It admitted the reasonableness of the rule but attacked the discriminatory manner in which defendant had applied it to the plaintiff. That was a question of law and it was not necessary to have the Commission pass upon it first. The court said (237 U. S. at p. 131): "In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission." See, also, Great Northern R. Co. v. Merchants Elevator Co. (1922) 259 U. S. 285, 66 L. ed. 943, 42 S. Ct. 477; Hollis v. Kutz, 255 U. S. 452, 65 L. ed. 727, P.U.R.1921C, 637, 41 S. Ct. 371.

In New York v. Maltbie (1936) 248 App. Div. 39, 17 P.U.R.(N.S.) 201, 289 N. Y. Supp. 562, affirmed (1937) 274 N. Y. 90, 21 P.U.R.(N.S.) 446, 8 N. E. (2d) 289, this court held that the Public Service Commission had jurisdiction to fix rates.

[1, 2] In the present case the plaintiff seeks an injunction, a declaratory judgment, and an accounting. The above cases indicate that the court may entertain jurisdiction. Although it may not be clear whether the term "service charge" as used in the statute covers a charge for turning on gas after it has been turned off for the summer, that being a question of law there is no necessity of sending the plaintiff back to the Commission to get its interpretation of the term as used in the statute, as the Commission has only such judicial power as in incidental to the exercise of its other powers. Plaintiff's legal remedy is inadequate. He cannot sue for the return of the charge as he has not paid. His legal remedy is to unite with twenty-four others similarly situated and ask the Commission to consider the question. That would seem a useless procedure, such as was condemned by Justice Holmes in Hollis v. Kutz, *supra,* in view of the fact that the Commission, by its practice over a

15-year period of approving rate schedules including the charge in question, has clearly indicated the interpretation it places upon the statute.

[3, 4] We next consider whether a representative action is proper. Plaintiff sues for the benefit of himself and all other consumers of gas who may be similarly situated, asking for an accounting to those who have paid the charge, for an injunction against charging those the company threatens to charge, and for a declaratory judgment for the benefit of those who may be subject to the charge in the future. It is proper here to allow the representative action for the injunction and the declaratory judgment, but not for the accounting. To maintain a representative action the plaintiff must show that he has a cause of action and that he is representative of a common or general interest. Bouton v. Van Buren (1920) 229 N. Y. 17, 127 N. E. 477. This plaintiff has no cause of action for an accounting. He has not paid the charge. Even if he did have a cause of action for an accounting a representative action would not be proper since it appears that the defendant is able to respond in damages, and there is no allegation that there is threatened a multiplicity of suits. To allow a representative action to require an accounting without the allegation that a multiplicity of suits is threatened, it must appear that there is a fund for the benefit of all creditors. Tyndall v. Pinelawn Cemetery (1910) 198 N. Y. 217, 91 N. E. 591; Bouton v. Van Buren, *supra*. Here there is no fund. The liability of the defendant is general and there is no threat of bankruptcy.

On the other hand, plaintiff not only has a cause of action for an injunction, since he is threatened with the collection of the charge, but in that respect he is representative of all those similarly situated. That is also true as to his application for a declaratory judgment. All consumers are interested in a declaration of the law. All consumers, as is this plaintiff, are liable in the future to be subjected to the charge in question.

[5] The important question here is the interpretation to be placed on the term "service charge" as used in the statute in its application to the particular charge here in question. In spite of the 15-year interpretation placed upon the statute with reference to the particular charge by the Public Service Commission, the wording of the statute is so broad that it is difficult to see how this charge can be distinguished from the service charge under consideration in Rochester v. Rochester Gas & E. Corp. 233 N. Y. 39, P.U.R.1922C, 793, 134 N. E. 828, which was a flat charge of 40 cents per month made to each consumer in addition to the price per thousand cubic feet for gas consumed. It is urged that the law prohibiting service charges was passed after the decision in that case in an evident attempt to prevent that particular charge. It may be that was the intention of the legislature, but such a presumed intention must give way to the plain language used. If that was the intention of the legislature all that was necessary to be said was that "service charges" were prohibited; yet it went further and said not only that additional charges for service were prohibited, but also charges "for the installation of apparatus or the use of apparatus

installed." The additional prohibition seems to indicate that the legislature intended a broad use of the term "service charge," the other two designations being merely indicative of its breadth. If, in the instant case, the defendant had discovered, when it attempted to turn off the gas at the request of the plaintiff, that locking of the meter would not prevent use of gas and that removal of the meter was necessary, clearly a charge for reinstalling the meter when turning on the gas would fall within the prohibition against a charge "for the installation of apparatus." The cost to the company would undoubtedly be greater than if it merely turned off the gas, yet if the construction contended for by the appellant were to be placed upon the statute it would follow that whether a charge may be made depends upon whether the company chooses to turn off the meter or to remove it and reinstall it.

The order should be affirmed, with costs, and the question certified answered in the affirmative.

Crane, C. J., and Lehman, O'Brien, Loughran, Finch, and Rippey, JJ., concur.

Order affirmed, etc.

MONTANA PUBLIC SERVICE COMMISSION

Residents of Miles City

v.

Montana-Dakota Utilities Company

[Docket No. 2738, Report and Order No. 1725.]

Return, § 52 — Right to earn — Fair value basis — Confiscation.

1. Enforcement of rates which are insufficient to yield a fair and reasonable return upon the present value of property used and useful in the public service constitutes confiscation and deprives the utility of its property without due process of law and denies it the equal protection of the laws, p. 359.

Rates, § 185 — Proof — Filing of complaint.

2. The mere filing of a complaint, whether it be formal or informal, is not in itself sufficient to authorize the Commission to reduce utility rates, p. 359.

Evidence, § 28 — Petitions.

3. Petitions signed by consumers of a utility asking the Commission to reduce rates are not in themselves evidence and should not be considered, since so to consider them is to deprive the utility of its right of cross-examination, p. 359.

[November 16, 1938.]

APPLICATION *by residents and customers to reduce gas rates; dismissed.*

APPEARANCES: Raymond Hildebrand, Attorney at Law, Glendive, for the Montana-Dakota Utilities Company; P. F. Leonard, Attorney at Law, Miles City, for the Holy Rosary Hospital; John W. Bonner, Counsel, Helena, for the Commission.

Before: Chairman Thomas E. Carey and Commissioners Horace F. Casey and E. E. Krebsbach at Miles City, Montana, April 19, 1938.

By the COMMISSION: Informal complaints were made to the Commission that the rates charged by the Montana-Dakota Utilities Company, a corporation, for gas service rendered to residents of Miles City, Montana, were unreasonable. This Commission thereafter set the matter for public hearing upon proper notice and public hearing was had at Miles City, Montana, on April 19, 1938. The utility presented evidence to show that the present rates charged by it to its consumers in Miles City, Montana, were reasonable. No evidence was submitted by the consumers and the Commission closed the case and took the matter under advisement.

[1] All of the evidence submitted by the utility in our opinion went to show that the present rates charged by the utility in Miles City are reasonable. We have heretofore held that a public utility is entitled to earn a fair and reasonable return upon the present value of its property used and useful in the public service. Re Thompson Falls (1938) 31 M. U. R. —, 22 P.U.R.(N.S.) 337; Re Horning (1938) 31 M. U. R. —, 24 P.U.R. (N.S.) 462, and to enforce rates which are insufficient to yield to a public utility a reasonable return upon the fair value of its property used and useful in the public service constitutes confiscation and deprives the utility of its property without due process of law as well as denies it the equal protection of the laws. The foregoing principle is so elementary that we do not deem it necessary to cite the numerous cases which support it.

[2, 3] The mere filing of a complaint whether it be formal or informal is not in itself sufficient to authorize the Commission to reduce the rates charged by a utility. While good and sufficient notice was given of the hearing to the public not one consumer or anyone else appeared before the Commission to show that the rates charged by the utility were unreasonable. It is true that the Commission was presented with petitions signed by consumers of the utility asking the Commission to reduce the rates but as we have held such petitions are not in themselves evidence and should not be considered since to so consider them is to deprive the opposing party of its right of cross-examination. Re Northern Pacific Transport Co. (1938) 31 M. U. R. —, 26 P.U.R.(N.S.) 268, *ante*.

There is nothing in the evidence which was introduced before the Commission to uphold the complaints filed with us asking that the rates of the utility be reduced and we, therefore, must dismiss the complaints for the reasons herein stated.

ARIZONA CORPORATION COMMISSION

Re Tarbell Transfer Company

[Docket No. 1743-S-700, Decision No. 9998.]

Certificates of convenience and necessity, § 23 — Transfer — Severance — Discretionary powers.

1. The Commission is vested with discretionary power to approve or disapprove the transfer of a certificate of convenience and necessity, and while it has a legal right to sever a certificate authorizing transportation of several commodities, it deems it inadvisable to do so, p. 362.

Certificates of convenience and necessity, § 138 — Transfer — Absence of physical property.

2. The Commission has looked with disfavor upon the transfer of a certificate of convenience and necessity where no physical property is involved, and unless there be great justification therefor, such transfer should not be approved, p. 362.

Certificates of convenience and necessity, § 1 — Investment — Reliance — Compensation.

3. The holder of a certificate of convenience and necessity, having in good faith made investments in reliance upon the authority contained in the certificate, does acquire a right for which he might be entitled to receive compensation, p. 362.

Commissions, § 11 — Duty — Public interest — Certificates of convenience and necessity.

4. The Commission's first obligation and duty, in the disposition of all cases affecting the public interest, is to the general public, and that fact cannot be ignored in consideration of the secondary rights of those operating under certificates of convenience and necessity, p. 364.

[October 4, 1938.]

APPLICATION *for permission to transfer and assign rights possessed under a certificate of convenience and necessity; dismissed.*

APPEARANCES: Virgil T. Bledsoe, Attorney, of the law firm of Fennemore, Craig, Allen & Bledsoe, Phœnix, in behalf of the Tarbell Transfer Company, and Frank Beer, Attorney, Phœnix, in behalf of Cantlay and Tanzola, Inc., for the applicants; George R. Darnell, Judge, of Darnell, Pattee & Robinson, Tucson, in behalf of the Tucson Warehouse & Transfer Company, also George R. Darnell, Judge, entered an appearance for Riney B. Salmon, Attorney, on behalf of the Southern Arizona Freight Lines, Ltd.; T. G. McKesson, Attorney, Phœnix, in behalf of the Arrow Van & Storage Co., Glenn Waldeman, Globe, and Virgil Burke, Globe; J.

W. Cherry, Jr., Attorney, representing Henderson Stockton, Attorney, Phœnix, in behalf of Muldner and Sons, in opposition.

BETTS, Commissioner: By a joint application filed with the Commission on September 15, 1938, Tarbell Transfer Company, a copartnership, sought authority to sell to Cantlay and Tanzola, Inc., a California Corporation, and the latter sought authority to purchase the right possessed by the Tarbell Company, by virtue of a certificate of convenience and necessity from this Commission, to haul cattle by motor vehicle over and along the public highways of the state.

Following due notice the application came on for hearing at the office of the Commission in Phœnix at 10 A. M., September 28, 1938.

The Tarbell Transfer Company, a copartnership consisting of O. H. and Emma V. Tarbell, is one of the oldest companies of its kind operating in the Phœnix district. It was functioning in the "horse and buggy days," long before the motor vehicle became a factor in the transportation field. It was one of the first operators to qualify under the original motor vehicle law, Chap. 130, Session Laws of 1919, bringing such activity under regulation. By an application filed on August 30, 1919, the then partnership applied for a permit to qualify under said law. Its first certificate, No. 161, was issued by the Commission on November 1, 1919.

Cantlay and Tanzola, Inc., was incorporated under the laws of California on June 9, 1931. It qualified as a foreign corporation under the laws of Arizona on April 6, 1935. This corporation is reputed to be one of the largest haulers of live stock in the southern California-Arizona territory, measured by volume of business. It first engaged in this transportation in interstate commerce between Arizona and California in 1932, previous to the enactment of the Federal Motor Carrier Law. At that time this Commission did not require interstate operators to formally register with the Commission. Such operators were, however, required to comply with our laws and the rules and regulations of this Commission relating to insurance, and safety of operations, and were, of course, required to comply with the laws, rules, and regulations of the Arizona Highway Commission govering the licensing of vehicles.

Following the passage of the Federal Motor Carrier Law, this Commission adopted the practice of requiring all interstate operators to formally register with the Commission and certificates of registration were issued after compliance with this requirement. Cantlay and Tanzola applied for registration as a carrier of live stock in interstate traffic on September 27, 1937. Certificate of Registration No. 4272, Docket No. 7201–A–4892, was issued on said application on October 20, 1937.

Live stock, as an agricultural product, is exempt from the provisions of the Federal Motor Carrier Law.

The hearing in this case was held in conformity with the provisions in our General Order No. 1490A, issued on November 15, 1937. There is no statutory law making such procedure necessary. Section 1682–h of the 1936 Supplement to the 1928 Code reads as follows: "Assignment and

revocation of certificates; permits. No certificate or permit issued in accordance with the provisions of this act shall be construed to be either a franchise or irrevocable, or to confer any property right upon the holder thereof, nor shall any such certificate or permit be assigned or otherwise transferred, without the consent and approval of the Commission. Upon the assignment or transfer of any certificate or permit, the Commission shall issue a new certificate or permit to the assignee or transferee only for the unexpired period of the transferred certificate or permit. The Commission may, at any time, for good cause, suspend and, upon not less than five days' notice to the grantee of any certificate or permit, after an opportunity to be heard, revoke or amend any certificate or permit."

As has heretofore been stated, the application covers only the transfer of the rights of the Tarbell Company to transport cattle in intrastate traffic. The evidence in the hearing disclosed the fact that there was no physical property involved.

[1–3] The principal issues arising under the application may be stated as follows:

(1) The power of the Commission to divide or sever a certificate covering the transportation of more than one commodity.

(2) The power of the Commission to transfer only a certificate where no physical property is involved.

(3) The right of a foreign corporation to engage in the public service business within the state unless said corporation was actually so engaged at the time of the passage of what is now § 733 of the 1928 Code.

(4) Whether or not it is necessary for an applicant, under the provisions of General Order No. 149–A, to make the same character of showing as to convenience and necessity as is required of an original applicant for a new certificate under the provisions of Chap. 100 of the Session Laws of 1933.

(5) Whether or not the Tarbell Company has actually been engaged in the transportation of live stock that would entitle it to claim the rights held under its certificate.

With reference to these issues we are of the opinion that:

(1) We have heretofore quoted the provisions of § 1682–h of the 1936 Supplement to the Code. It will be observed that the legislature has not attempted to determine what shall govern transfers of certificates or permits. It is obvious that it was realized that there would be varying circumstances surrounding such transfers and that approval or disapproval should be left to the discretionary power of the Commission. Manifestly it was for this reason that no hard and fast statutory rules were laid down. We will hereinafter discuss this issue at length.

(2) There has been no legal determination of the point raised in the second of these issues and in view of the disposition which we are making of the case, it is unnecessary to consider it further than to say that as a general proposition the Commission has looked with disfavor upon such transfers and it is of the opinion that unless there be great justification therefor, such transfer should not be approved. It is of the further opinion, however, that a certificate holder, having in good faith made investments

upon the strength of the authority contained in the certificate, does acquire a right, perhaps intangible, for which he might be entitled to receive compensation.

(3) This point rests upon the provisions of § 733 of the 1928 Rev. Code which reads as follows:

"Foreign public service corporations; restrictions on. No foreign corporation, unless authorized to transact a public service business within this state, shall transact within this state any public service business, nor transact within this state any public service business of a character different from that which it is authorized to transact; nor shall any license, permit, or franchise to own, control, operate, or manage any public service business be granted or transferred, directly or indirectly, to any foreign corporation not lawfully transacting within this state a public service business of like character; provided, that foreign corporations engaging in commerce with foreign nations, or commerce among the several states of the United States, may transact within this state such commerce and intrastate commerce of a like character."

It was urged, with energy and force, that the provisions of this section permitting the operation of a foreign corporation were and are applicable only to such corporations as were actually engaged in the public service business at the time of the enactment of the law, and that it constitutes a bar to the admission of any corporation not so engaged at that time.

This is another point upon which the courts have not passed, and in view of our disposition of this case, it is unnecessary for us to attempt to interpret it. We may add, however, that we would be very reluctant to place an absolutely restrictive interpretation thereon.

(4) Since our decision in this case does not rest on this point, and inasmuch as there is a division of opinion between the Commissioners themselves with reference thereto, we shall refrain from discussion thereof.

(5) In its General Order 133–A, issued August 17, 1937, the Commission sought to more clearly define the rights of live-stock carriers and to provide for a statewide service which would meet the needs of the live-stock growers in particular, and the public generally using this character of service.

Experience has shown that it is to the best interests of the live-stock shipper to have his shipments transported from the point of origin to destination without transfer. This would give an expedited service and avoid transfers which would be necessary if two or more lines participated in the haul. It is a well-known fact that transfers not only result in delays, but, at times, serious injury to stock.

The provisions of this general order required all operators to make a showing of their existing rights within a stated period, and where the circumstances justified it, new certificates were issued, giving statewide authority.

Conforming to these requirements the Tarbell Transfer Company, on September 28, 1937, applied for a new certificate. There was evidence supporting the claim of the applicant that it was currently engaged in the handling of live stock and that numerous

shippers desired the applicant to continue to serve them.

On November 2, 1937, in Decision No. 9329, Docket No. 1743–S–700, the Commission issued its opinion and order ratifying the rights shown to exist, and authorized the continuation of the service as follows:

(1) Freight, baggage, sand, rock, and gravel;

(2) Live stock within the state of Arizona.

From the foregoing it is obvious and the Commission finds that the Tarbell Company is possessed of the rights to haul live stock.

It was urged that Cantlay and Tanzola have a class of equipment which is superior to that possessed by any other live-stock haulers within the state, and that there is a real necessity, from the standpoint of the grower and shipper, for the use of such equipment. The records of the Commission, of which we will take judicial knowledge, disclose the accuracy of this assertion to the extent that their large Diesel trucks operated in connection with trailers, are capable of handling a carload of live stock at one time. It has been stated, and we doubt not that it is true, that these large units negotiate the highways more smoothly than the smaller equipment, and that the live stock is not subjected to as rough handling as is the case with the smaller units. The Commission has knowledge of considerable injury to live stock handled by the smaller equipment heretofore.

[4] In the disposition of all cases affecting the public interest, the Commission's first obligation and duty is to the general public and we cannot lose sight of that fact in consideration of the secondary rights of the operators.

In the fall of the year there is a heavy seasonal movement of live stock from certain districts in the state, particularly that territory in and around Springerville. It is a matter of record that heretofore the service during this seasonal period has been both insufficient and unsatisfactory. We have found it necessary on several occasions to issue emergency orders in endeavors to relieve this situation. The results still were not what we should like to see.

We shall expect the existing operators to meet this condition for the season which is now opening, and give sufficient and adequate service to the shippers. If they fail or refuse to do so, on or before the 20th day of October, 1938, we shall authorize additional service such as the records show can be given by Cantlay and Tanzola, either through that company or through some other source.

We now revert to issue No. 1, raised herein:

While we are of the opinion that under the discretionary power vested in us we would have the legal right to make the severance herein sought, we are of the opinion that it is inadvisable to establish that precedent. If it could be done with reference to cattle, it might also be done with reference to any single commodity, and followed to its ultimate conclusion, an existing permit might be divided into fifty or more permits. Such an eventuality would lead to confusion and in fact would demoralize our attempts to administer effective regulation.

For the reasons herein stated, we are of the opinion and find that the

application of the applicants herein should be dismissed.

ORDER

It is hereby *ordered:* That in conformity with the findings just made, the application of the applicants herein be and it is hereby dismissed; providing, however, that the record will be held open for such time as may be necessary to the end that the Commission may take appropriate action in the event of the failure of the existing operators to care for the movement of live stock during the peak movement which is now about to begin.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Public Utility Commission (J. B. Stewart et al.)

v.

Solar Electric Company

[Complaint Docket No. 11404 (8126).]

Valuation, § 30 — Rate base determination — Original cost — Reproduction cost.

1. The rate base is properly measured by original cost of property when there is sufficient evidence to establish historic or original cost while there is a wide divergence in testimony relating to reproduction cost less depreciation, p. 367.

Valuation, § 86 — Accrued depreciation — Deduction — Original cost basis.

2. No deduction should be made for accrued depreciation when the undepreciated original cost method of rate making is used, p. 367.

Depreciation, § 32 — Annual allowance — Sinking-fund method.

3. The 4 per cent sinking-fund method of annual depreciation was adopted in fixing electric rates, p. 367.

Valuation, § 331 — Going concern value — Necessity of evidence to support.

4. No specific sum should be allowed for going concern value when no evidence is produced to show any lag in earnings during the early stages of operation and no specific amount is shown for going concern value, p. 368.

Valuation, § 193 — Unused property — Generating plant.

5. The value of a generating plant which is not used and useful in public utility business should be excluded from the rate base of an electric utility, p. 369.

Valuation, § 114 — Cost of financing — Absence of evidence — Brokerage cost.

6. No specific amount should be allowed as cost of financing when there is no evidence regarding brokerage cost, which is the only item that can be legitimately considered as a cost of financing, p. 369.

Evidence, § 22 — Printed report — Facts and conclusions.

7. Admission in evidence, in a rate case, of a printed report prepared by employees of the Federal Power Commission, who are witnesses in the proceeding and available for cross-examination, is proper when the report is merely a repetition of facts as found by the witnesses and when the Commission relies only upon the facts and not upon the witnesses' conclusions, p. 369.

Expenses, § 83 — Payments to affiliated companies — Burden of proof.

8. Payments made by a public utility company to affiliated interests should be disallowed when the utility company fails to meet the burden of proof as to the value, necessity, or benefit of the services rendered, p. 369.

Expenses, § 91 — Rate case expense — Excessive rates.

9. Amounts paid by a public utility company for rate case investigation should be disallowed as operating expenses when the company's action in the case has been arbitrary and unwarranted and it is found that the rates have been excessive, p. 370.

Return, § 87 — Electric utility.

10. Exceptions by an electric utility to an allowance of a rate of return of 6 per cent on the rate base were dismissed, p. 371.

Rates, § 645 — Scope of proceeding — Reparation claims.

11. Orderly procedure requires that the matter of refund because of overcharges be determined in a separate proceeding, when much time has elapsed in a rate investigation and the record is large and where it is desirable that the order become effective immediately with respect to future rates, p. 372.

[November 1, 1938.]

EXCEPTIONS *on behalf of electric utility company and certain private complainants and a borough to order nisi issued by Commission in electric rate investigation; exceptions dismissed, slight adjustments in expense allowances made, and order made final. See also 24 P.U.R.(N.S.) 337.*

By the COMMISSION: The Commission, under date of July 5, 1938 (24 P.U.R.(N.S.) 337) issued its order nisi in this proceeding. Exceptions on behalf of respondent, Solar Electric Company, were filed to this order, some 128 in number, covering 56 pages. Exceptions also were filed on behalf of J. B. Stewart et al., private complainants, and by the borough of Brookville.

A discussion of these questions will best indicate their scope and best dispose of the principal matters contained therein. The exceptions of the Solar Electric Company divided themselves into the following classification of problems:

1. The order is attacked because it established rates on the basis of the original cost of the property used and useful in public service, rather than fixing rates on the basis of the reproduction cost new less accrued depreciation of the respondent's property.

2. The order is attacked because of the failure of the Commission to allow as a separate item of value, going concern value of the plant.

3. The order is attacked because no allowance was made in the rate base for the respondent's generating plant, not presently used in rendering service but which respondent claims is necessary as a standby plant.

4. The order is attacked because no specific allowance was made for cost of financing.

5. The order is attacked because there was admitted to this record a printed report prepared by employees of the Federal Power Commission, H. L. Osman and Anson Wilhelm, both witnesses in this proceeding, which same report these witnesses previously had identified for the record in a proceeding before the Federal Power Commission.

6. The order is attacked because the Commission found from the evidence in the Osman and Wilhelm report that certain payments were made to affiliated companies and that those expenses must be disallowed because the respondent had not, after full opportunity, presented any evidence in justification of said expenses.

7. The order is attacked because there was excluded from the allowance for operating expenses the expenses of this rate proceeding.

8. The order is attacked by certain other exceptions of a general nature, not included in any of the above classifications.

For the purpose of this report, we shall attempt to treat each of the above-numbered classifications and dispose of the exceptions in the report and order directed to each.

1. *The Basis for Establishing Rates*

[1–3] It has been decided by the Supreme Court of the United States that fair rates may be establishd by a Commission on the basis of the original cost of the property of the utility: California R. Commission v. Pacific Gas & E. Co. (1938) 302 U. S. 388, 82 L. ed. 319, 21 P.U.R.(N.S.) 480, 58 S. Ct. 334; Los Angeles Gas & E. Corp. v. California R. Commission, 289 U. S. 287, 77 L. ed. 1180, P.U.R. 1933C, 229, 53 S. Ct. 637.

This method has also been adopted by a number of states in their rate regulation of public utilities: Re Pacific Gas & E. Co. (Cal. 1933) 1 P.U.R.(N.S.) 1; Re Cudahy Bros. Co. (1926) 30 Wis. R. C. R. 561; Re Jamestown Gas Co. (N. D.) P.U.R.1921E, 406; Re Portland Electric Power Co. (Or.) P.U.R.1930D, 357. In our order nisi in this matter, we have found as a matter of fact that there was sufficient evidence contained in respondent's books and records to establish the historic or original cost of respondent's property used and useful in utility business.

Due consideration was given to the testimony, both of respondent's engineers and complainants' engineers, relating to reproduction cost new less accrued depreciation. We find a wide divergence in this testimony and because of this we have come to the conclusion in this case that the reproduction cost new less accrued depreciation theory of rate valuation would not give a fair and substantial valuation to respondent's property. In consistency with our use of the undepreciated original cost method of rate making, we have not subtracted

any sum for accrued depreciation. We also adopt 4 per cent sinking-fund method of annual depreciation which was shown to be just, adequate, and in keeping with the respondent's experience as reflected in its books. The 4 per cent sinking-fund method of annual depreciation has been sustained by the Pennsylvania courts. See Scranton-Spring Brook Water Service Co. v. Public Service Commission (1935) 119 Pa. Super. Ct. 117, 14 P.U.R.(N.S.) 73, 181 Atl. 77. For these reasons, in addition to what has been set forth in our order nisi, we dismiss the following exceptions of respondent: Nos. 4, 5, 6, 7, 8, 9, 10, 11, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34.

2. Going Concern Value

[4] In our order nisi we refused to allow any specific sum for the going concern value of respondent's plant. The law in Pennsylvania regarding going concern value is set forth very fully in Chambersburg Gas Co. v. Public Service Commission (1935) 116 Pa. Super. Ct. 196, 214, 7 P.U.R. (N.S.) 359, 371, 176 Atl. 794:

"Going concern value is allowed not because it represents a deficit in earnings, but because it is a part of the development cost, and this court has committed itself to the proposition that it is not allowable unless it has resulted in a lag. It follows that the burden is here on the utility to show that there has been a lag and the amount that should be allowed for going concern value."

See also Columbus Gas & Fuel Co. v. Ohio Pub. Utilities Commission (1934) 292 U. S. 398, 78 L. ed. 1327, 4 P.U.R.(N.S.) 152, 54 S. Ct. 763, 91 A.L.R. 1403.

In the testimony given at the hearings in this case which consumed a period of some seven years, the respondent produced no evidence to show any lag in earnings during the early stages of its operation, nor has it shown any specific amount which it claims for going concern value. In our order nisi we showed quite clearly from respondent's own books that there was no lag in its earnings during its early stages. All of the respondent's testimony in this respect was vague and argumentative. This same situation exists in respondent's exceptions to our order nisi.

In an opinion handed down by the statutory court of the United States for the northern district of California in Pacific Gas & E. Co. v. California R. Commission (1938) — F. Supp. —, 26 P.U.R.(N.S.) 1, 12, there is contained a very enlightening discussion of going concern value. We quote therefrom:

"There is, therefore, no doubt that the Commission recognized the going concern value and also that it declined to make a specific allowance therefor in the rate base on the theory that that value was already reflected in the historic cost and in the rate base deduced therefrom so far as the company was entitled to have the value considered."

See also Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. ed. 1469, 24 P.U.R. (N.S.) 155, 58 S. Ct. 990. We, therefore, refuse to allow any specific sum for going concern value and dismiss respondent's exception No. 31.

3. *Generating Plant*

[5] In our order nisi we disallowed the value of a generating plant of the respondent which was not being used in respondent's utility business, but which it claimed was necessary as a standby plant. We did allow the value of the land and buildings upon which and in which this generating plant stood because there was evidence of record to show that this building was also used as a storeroom for property used and useful in utility business. It is unnecessary for us to go further into the matter except as we have already done in our order nisi.

Suffice to say, we find as a fact that this generating plant was not property used and useful in public utility business, and therefore we dismiss the following exceptions of respondent: Nos. 12, 13, 14, 15, 16, 17.

4. *Cost of Financing*

[6] In our order nisi we refused to allow any specific amount as a cost of financing the respondent's utility business. The only item that can be legitimately considered as a cost of financing is a brokerage charge. There was no evidence introduced by respondent, and the record is bare regarding brokerage costs of respondent. This item is fully covered in our order nisi. We, therefore, dismiss respondent's exception No. 30.

5. *Osman-Wilhelm Report*

[7] A printed report prepared by H. L. Osman and Anson Wilhelm was offered in evidence. This report was prepared by Osman and Wilhelm for the Federal Power Commission. It deals with the intercorporate relationship of various companies comprising the Associated Gas and Electric Company system. Contained in this report are a number of facts upon which Osman and Wilhelm base their conclusions. Both Osman and Wilhelm were present and testified in this case and respondent had ample opportunity to cross-examine them on any matter that was contained in said report. This report is clearly not hearsay, but is a repetition of facts as found by two witnesses, both of whom were placed on the stand, identified the report and were subject to cross-examination. The respondent had ample opportunity to show by contradictory evidence that the facts set forth in said report were false and based upon incorrect books and records. This they did not do. We, therefore, admitted this report in evidence.

In our study of this report, upon which we based a number of our findings, we relied strictly on the facts set forth by Osman and Wilhelm in their report, and we were in no way influenced by their conclusions therefrom. The conclusions in our order nisi are the conclusions of the Pennsylvania Public Utility Commission. In view of the foregoing, we, therefore, dismiss respondent's exceptions Nos. 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 77, 83, 98.

6. *Disallowance of Payments to Affiliated Companies*

[8] Based upon the evidence contained in the Osman-Wilhelm report, we found in our order nisi that certain companies were affiliated. These companies are set out at length in our

order nisi. We have disallowed any payments made to these affiliated interests because there is no evidence whatever in the record as to the value, necessity, or benefit of the services rendered by these affiliated companies to the respondent. The Commission endeavored to establish the relationship of the various servicing companies with Solar Electric Company through questions directed to officials of the respondent at the hearing. The record is replete with evasive and unresponsive answers to these questions. The books of respondent do not indicate what, if any, services were performed. Although full opportunity was afforded, no proof was forthcoming. Access to the books of the affiliates was refused. Clearly the respondent has failed to meet the burden of proof.

In Johnsonburg v. Public Service Commission (1930) 98 Pa. Super. Ct. 284, it was held that where two companies were closely associated and under common management, close scrutiny should be given by the Commission to contracts between them, and services rendered thereunder must be fully shown. See also Smith v. Illinois Bell Teleph. Co. (1930) 282 U. S. 133, 75 L. ed. 255, P.U.R.1931A, 1, 51 S. Ct. 65; Chambersburg Gas Co. v. Public Service Commission, *supra;* Scranton-Spring Brook Water Service Co. v. Public Service Commission, *supra.* Respondent not only did not prove the value, necessity, and benefits of the services rendered by affiliated interests to it, but respondent's affiliates moreover refused even after Commission order to produce such evidence. Contention was made by respondent that these services and the contracts therefor were purely managerial, and as such the Commission had no right to question them. However, whenever any managerial acts become so unreasonable and arbitrary that it requires 20 per cent of respondent's entire operating revenue to pay for such managerial services, then this Commission must and will take cognizance of the tremendous burden placed on the public.

When these so-called servicing agreements are made between parties not dealing at arm's length, amounting to substantial sums, where no proof of service appears in the records of the operating utility, where the books of the so-called affiliates are refused the regulatory Commission and all explanations of such charges ignored, the duty of the regulatory body is clear. We dismiss exceptions Nos. 43, 44, 45, 75, 76, 78, 79, 80, 81, 84, 85, 87, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 115. Exception No. 116 is dismissed except as hereinbelow set forth.

We find in reviewing our order nisi that we have included on page 81 thereof under "Pool Expenses from Pennsylvania Electric Company" the sum of $22.08 for the year 1936 and $259.20 for the year 1937, which items are charged to uncollectible consumers' accounts. These items do not belong under "Pool Expenses from Pennsylvania Electric Company" but rather under "General Expenses," and we, therefore, make this change in our order nisi. To this extent exception No. 116 is sustained.

7. Disallowance As Operating Expenses of Expenses of Rate Proceedings

[9] We disallowed under operating

expenses any amounts that were paid by respondent as charges for this rate case investigation. We are of the opinion after a very careful consideration of the entire record that the respondent's action in this case has been arbitrary and unwarranted. We find that the rates heretofore charged by respondent have been excessive. We, therefore, dismiss respondent's exceptions 88 and 89.

8. *General*

The foregoing treatment of respondent's exceptions disposes of all but a few of them. Most of those remaining pertain to other disallowed operating expenses.

Respondent has no objection to the method of computing working capital, but excepted to the allowance of our order nisi because of our disallowance of certain operating expenses. The treatment of these operating expenses in our order nisi has been affirmed heretofore in this final order, paragraphs Nos. 6 and 7 (*supra*). Therefore, relying on the reasons given in disallowing respondent's exceptions in paragraphs 6 and 7 above, we disallow exception No. 29.

In our order nisi we disallowed the full amount set up by respondent as a reserve for "uncollectible consumers' accounts." (Exception No. 86.) We disallowed as an operating expense the full amount paid as rental for respondent's Brookville offices, allowing only a partial amount of the rental claimed (exception No. 99). We also found that respondent's force at Brookville was ample and adequate to render good, continuous, sufficient service to its consumers (exception No. 114).

As these exceptions are purely ones to findings of fact, we have again carefully perused the voluminous record in this case and find that the evidence clearly and unequivocally supports said findings. We, therefore, dismiss respondent's exceptions Nos. 86, 99, and 114.

[10] We allowed a rate of return of 6 per cent on the rate base. Respondent has excepted thereto. We are of the opinion that we have covered this fully in our order nisi and relying on the reasoning set forth therein, we dismiss respondent's exception No. 117. See Pacific Gas & E. Co. v. California R. Commission, *supra*.

Respondent excepts to the Commission's findings in this matter because said findings are based chiefly upon an examination of respondent's operations covering the period from January 1, 1936, to May 31, 1937. Respondent contends that such a period is not of sufficient scope and sufficiently representative for the basis upon which rates for the future shall be predicated. We are of the opinion that the examination of such a period is full and sufficient for us to make findings upon which we can predicate a future rate base. We, therefore, dismiss respondent's exception No. 118.

Respondent has excepted to our application of the law in the cases of Re New York State Electric & Gas Corp. (N. Y.) P.U.R.1932E, 1, and from New York State Electric & Gas Corp. v. Maltbie (1935) 245 App. Div. 131, 9 P.U.R.(N.S.) 163, 281 N. Y. Supp. 384. In so doing respondent maintains without fail its consistent attitude in preserving the sanctity and holiness of the Associated Gas and Electric combine. In these New York cases, the same situation

with which we are now confronted arose and for the first time some of the facts behind this combination were brought to light. We also feel that in this case we are doing just what was done by the New York Commission and sustained by the New York courts. While this exception does not in any way attack the findings and order contained in our order nisi, nevertheless, for the reason set forth above, we will dismiss respondent's exception No. 113.

We also dismiss respondent's exceptions Nos. 12, 3, 32, 112, as being immaterial. Respondent's exceptions Nos. 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, are exceptions to conclusions which were arrived at upon the facts and reasons set forth in our order nisi. The facts and reasons upon which these exceptions are based have been treated fully and at length in the foregoing paragraphs of this order. We, therefore, dismiss respondent's exceptions Nos. 119 to 128, inclusive. This disposes of all of respondent's 128 exceptions.

[11] The exceptions filed by the private complainants, J. B. Stewart et al., and by the borough of Brookville, principally attack the order of the Commission for the reason that it failed to find what the fair return would have been for each year subsequent to 1927, a date two years prior to the filing of the original complaint in this proceeding, and to provide for refunds to consumers.

At the time the original private complaint was filed with the Commission, the law provided that a petition for refund could subsequently be filed with the Commission, permitting a recoupment of the excessive rates paid from a date two years prior to the rate of the filing of the complaint. Centre County Lime Co. v. Public Service Commission (1931) 103 Pa. Super. Ct. 179, 157 Atl. 815. Under the law at that time, and as it existed until 1937, a reparation petition was filed in addition to a complaint against existing rates. The law was changed in 1937, and it was provided that the Commission could in its rate order dispose of the question of refund. Because of the very obvious reason that the consumers of the respondent company are entitled to have their claims for refund considered, and because they have not been so considered in the order we have issued, it is necessary to provide in this final order of the Commission some way whereby these claims may come properly before the Commission.

The order nisi of the Commission obviously did not take into consideration the questions complained of in the exceptions of these parties, but dealt only with future rates. It is necessary, however, that the order become effective immediately with respect to future rates.

We are of opinion that in a case such as this, orderly procedure requires that the matter of refund be determined in a separate proceeding. Because of the time that has elapsed since this case was instituted and the size of the record, this is the type of case in which refunds should be determined in separate proceedings. Therefore, the exceptions relating to refund must be dismissed with leave to the exceptants or any party entitled to redress to file a separate petition for refund. These include exceptions Nos. 1 and 2 of the exceptions of J.

B. Stewart et al., private complainants, and exceptions Nos. 1, 2, 3, 4, 5, 6, and 7 of the borough of Brookville.

The above disposes of all of the exceptions of the borough of Brookville. Two additional exceptions were filed in the exceptions of J. B. Stewart et al. Exception No. 3 is directed to the allowance of $4,500 of land and building of old plant to remain in fixed capital, and exception No. 4, a finding of a rate base of $152,601.57. The reasons for our findings of these items are fully set forth in our order nisi, and for the reasons stated therein, these exceptions are dismissed.

NEW YORK DEPARTMENT OF PUBLIC SERVICE, STATE DIVISION, PUBLIC SERVICE COMMISSION

Re Liability Clauses in Rate Schedules of Gas and Electric Corporations

[Case No. 9439.]

Service, § 166 — Release from liability — Misleading statements.

1. Public utilities should not be permitted to include in their schedules provisions seeking to release them from liability for gross negligence or wilful misconduct, since the effect of same is to mislead consumers as to their rights of action, even though a court will hold such provisions ineffective and void, p. 374.

Service, § 166 — Limitation of liability.

2. Public utilities should be required to cancel any clause in their schedules which seeks to limit the liability of the companies for damages resulting from their own negligence in connection with the property owned, installed, or maintained by the customer or leased by the customer from third parties, p. 375.

Service, § 166 — Limitation of liability.

3. Gas and electric utilities should be required to cancel any clause in their schedules which seeks to limit their liability for any damages resulting from the negligence of the company in connection with the supply or use of electricity or gas or from the presence or operation of the company's structures, equipment, wires, pipes, appliances, or devices on the customers' premises, p. 375.

[November 30, 1938.]

CONSIDERATION *of clauses in filed rate schedules of certain electric and gas corporations attempting to relieve them of liability; provisions ordered canceled.*

APPEARANCES: Gay H. Brown, Counsel (by J. Herbert Gilroy, Assistant Counsel), for the Public Service Commission; LeBoeuf, Machold and

Lamb (by Randall J. LeBoeuf), New York city, for the Niagara Hudson Companies; A. T. O'Neill, Buffalo, for Niagara Hudson Companies; Whitman, Ransom, Coulson & Goetz (by Colley E. Williams), New York city, for Brooklyn Borough Gas Company and the New York and Richmond Gas Company; Albert J. Danaher, Albany, for the New York Power and Light Corporation; Cullen & Dykman (by Jackson A. Dykman), Brooklyn, for the Brooklyn Union Gas Company; Beardsley and Taylor (by Thomas H. Beardsley), New York city, for Consolidated Edison Company of New York, Inc.; Griggs, Baldwin and Baldwin (by Charles G. Blakeslee), New York city, for Queens Borough Gas and Electric Company, Long Island Lighting Company, and the Cabot Gas Company; Whitman, Dey & Nier (by Earle L. Dey), Rochester, for Rochester Gas & Electric Corporation; Edward B. Naylon, New York city, for New York State Electric and Gas Company and Staten Island Edison Corporation; Kenefick, Cooke, Mitchell, Bass, and Letchworth (by Daniel J. Kenefick) Marine Trust Building, Buffalo, for Iroquois Gas Corporation; F. L. Lovett, Nyack, for Rockland Light and Power Company; John Howell, Buffalo, for Republic Light, Heat & Power Company, Inc., and Northwestern Gas Company; John G. Kimball, Buffalo, for Niagara Gas Corporation; John R. Gardner, Poughkeepsie, for Central Hudson Gas and Electric Company.

By the COMMISSION: It having come to the attention of the Commission that certain electric corporations and gas corporations were including in their filed rate schedules provisions which by their language attempted to relieve such corporations from liability resulting from discontinuance of service and certain other causes, the Commission issued its order for an investigation concerning these matters. Hearing was held at the city of Albany on March 2, 1938. Subsequent to said hearing, several conferences have been had between representatives of the electric and gas corporations and counsel to the Commission.

Such clauses in filed schedules we will divide into three groups.

[1] *First. With respect to liability of companies for failure of continued service:*

It appears that under the decisions of the courts of this state a utility company may not relieve itself from liability for damages where same were caused by the gross negligence or wilful misconduct of the utility, its officers, agents, or servants. While it is true that a court will hold ineffective and void a provision which seeks to release a company from liability for gross negligence or wilful misconduct, no company should be permitted to have such a clause included in its schedule, as the effect of same is to mislead the consumers as to their rights of action.

The companies should be required to cancel any clause in their schedules which attempts to relieve the company from liability for gross negligence or wilful misconduct. The Commission will not object to the inclusion in said schedules of the following clause:

"The company will endeavor at all times to provide a regular and uninter-

rupted supply of service, but in case the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control or through ordinary negligence of employees, servants, or agents the company will not be liable therefor."

[2] *Second. With respect to liability of companies for structures, equipment, wires, pipes, appliances, or devices owned, leased, installed, or maintained by the customer*:

The companies desire to have included in their schedules a clause which gives notice to the consumers that the company by inspection or nonrejection does not give any warranty, express or implied, as to the adequacy, safety, or other characteristics of any structures, equipment, wires, pipes, appliances, or devices owned, installed, or maintained by the customer or leased by the customer from third parties. The Commission sees no objection if the companies include in their schedules a provision which specifically sets forth that under the circumstances enumerated above the company does not give any warranty, express or implied.

The companies should be required to cancel any clause in their schedules which seeks to limit the liability of the company for damages resulting from its own negligence in connection with the property owned, installed, or maintained by the customer or leased by the customer from third parties. The Commission will not object to the inclusion in said schedules of the following clause:

"Neither by inspection or nonrejection, nor in any other way, does the company give any warranty, expressed or implied, as to the adequacy, safety, or other characteristics of any structures, equipment, wires, pipes, appliances, or devices owned, installed, or maintained by the customer or leased by the customer from third parties."

[3] *Third. With respect to liability of companies resulting from the supply or use of electricity or gas, or from operation of companies' structures, equipment, etc., upon consumers' premises*:

The companies are not insurers against damages resulting from the supply or use of electricity or gas or from the presence or operation of the companies' structures, equipment, wires, etc., on the customers' premises, but the company is liable if any damages result from the negligence of the company.

The companies should be required to cancel any clause in their schedules which seeks to limit the liability of the company for any damages resulting from the negligence of the company in connection with the supply or use of electricity or gas or from the presence or operation of the company's structures, equipment, wires, pipes, appliances, or devices on the customer's premises. The Commission will not object to the inclusion in said schedules of the following clause:

"The company will not be liable for any injury, casualty, or damage resulting in any way from the supply or use of electricity or gas or from the presence or operation of the company's structures, equipment, wires, pipes, appliances, or devices on the customer's premises, except injuries or damages resulting from the negligence of the company."

Conclusion

Any company having in its filed schedules provisions condemned in this opinion should cancel same by February 1, 1939.

FEDERAL POWER COMMISSION

H. Jerome Jaspan

v.

Philadelphia Electric Company

[Docket No. IT-5461, Opinion No. 35.]

Procedure, § 10 — Commission investigation — Justification.

1. Further investigation and inquiry into matters involved in a complaint cannot be justified when the showing made by the complainant or the results of a preliminary investigation by the Commission show that the complaint is without justification or basis in fact, p. 379.

Discrimination, § 104 — Rates for wholesale power.

2. A complaint that an electric company is supplying interstate service to another company under contract at such a low rate as to impose an excessive and unjust burden upon other classes of consumers, particularly upon residential consumers, should be dismissed when it appears that the rates charged for such wholesale service are not unreasonably low or less than the cost of generating, transmitting, and supplying the energy, and, in fact, provide a substantial return on the investment, p. 379.

Discrimination, § 8 — Powers of Federal Commission — Electric rates.

3. The Federal Power Commission has no power or authority to remove unjust discrimination which may be the result of rates charged by an electric company to its intrastate domestic consumers, p. 379.

[December 3, 1938.]

COMPLAINT *by domestic customer against alleged discrimination by electric company in furnishing interstate service under contract to another electric company; dismissed.*

APPEARANCES: Arnold H. Hirsch, Philadelphia, on behalf of complainant; Wm. Clarke Mason, of Morgan, Lewis & Bockius, Philadelphia, and Frank M. Hunter, Chester, on behalf of defendant; Thomas J. Tingley, Assistant Solicitor, on behalf of the Commission.

By the COMMISSION: The complainant, H. Jerome Jaspan, on February 23, 1937, filed with the Federal Power Commission a complaint against the Philadelphia Electric Company, charging that electric energy was being sold by the Philadelphia Electric Company under contract to

Delaware Power & Light Company at an average rate of 4.9 mills per kilowatt hour, although the cost of production was approximately 1.5 cents per kilowatt hour; that such sale imposed an excessive and unjust burden upon other classes of consumers, particularly upon the residential consumers in Philadelphia whose average rate approximated 5 cents per kilowatt hour; that the rates charged Delaware Power & Light Company were unduly preferential in violation of § 205 (b) of the Federal Power Act and confiscatory of the property of Philadelphia Electric Company.

The defendant, Philadelphia Electric Company, on March 23, 1937, filed its answer denying that electric energy was sold to Delaware Power & Light Company at a rate below the cost of production; that the total cost of each kilowatt hour produced and sold by defendant to Delaware Power & Light Company approximated 1.5 cents; that the actual cost of production to defendant of the electric energy sold to Delaware Power & Light Company was greater than the sale price of such energy under the provisions of the agreement between the parties. The answer of the defendant admitted that during the year ending December 31, 1936, Philadelphia Electric Company sold to Delaware Power & Light Company, under the written agreement between the parties, 172,131,384 kilowatt hours of electric energy for which it received $844,394, or an average of 4.9 mills per kilowatt hour.

The Philadelphia Electric Company is controlled by the United Gas Improvement Company through ownership of 97.4 per cent of the common voting stock. The United Gas Improvement Company also controls Delaware Power & Light Company through ownership of all of the common stock of Delaware Electric Power Company which, in turn, owns all of the voting stock of Delaware Power & Light Company. The Philadelphia Electric Company sells electric energy to Delaware Power & Light Company under the terms of a written agreement dated April 1, 1930, and certain agreements supplemental thereto, all of which are filed with the Federal Power Commission and are designated in the files of the Commission as Philadelphia Electric Company Rate Schedule FPC No. 4.

By order of the Commission, the matters brought into issue by the complaint and answer in this cause were assigned for hearing on September 15, 1937. At the hearing oral testimony was given by the complainant, H. Jerome Jaspan, but his testimony was limited to the statements that he was the complainant; that he purchased electricity for use in his home in Philadelphia from the Philadelphia Electric Company, and that he had so purchased electric energy for a period of nine or ten years. Documentary evidence submitted at the hearing on behalf of the complainant consisted of nine exhibits, being annual reports submitted by the Philadelphia Electric Company to the Public Service Commission of the commonwealth of Pennsylvania for the years ending December 31, 1934, December 31, 1935, and December 31, 1936; certified copy of the agreement covering the sale of electric energy by Philadelphia Electric Company to Delaware Power &

Light Company bearing date of April 1, 1930, and supplements thereto in effect during the years 1934, 1935, and 1936; certified copies of monthly bills, with supporting detail, rendered by the Philadelphia Electric Company to Delaware Power & Light Company for the calendar years 1934, 1935, and 1936; certified statement of the residence electric account of the complainant, H. Jerome Jaspan, as shown by the books and records of the Philadelphia Electric Company, for the years 1934, 1935, and 1936, as well as copies of the bill forms used by the Philadelphia Electric Company during this period in billing for domestic service.

At the conclusion of complainant's case the defendant by written motion moved the Commission to dismiss the complaint alleging that (1) the complainant had failed to prove the averments of the complaint necessary to sustain his cause of action; and (2) the Federal Power Commission was without jurisdiction to grant the relief prayed for in the complaint because it lacked the power to increase defendant's rate for the sale at wholesale of electric energy in interstate commerce on a complaint of alleged discrimination against domestic consumers of electric energy sold and delivered by defendant under intrastate rates and charges. Ruling upon the motion to dismiss was reserved by the examiner for determination by the Commission. On March 30, 1938, the Commission by order denied defendant's motion to dismiss, reopened the proceedings for the receipt of evidence, material and relevant to the determination of the issues in the cause, and directed the defendant to supplement the record with evidence (1) in support of its contention that the sale price of energy sold to Delaware Power & Light Company was not below the actual cost of production of the energy sold; (2) to show the advantages and disadvantages of its contract with Delaware Power & Light Company to both of the parties thereto, and (3) to show such other and additional facts as might be necessary and appropriate to enable the Commission to reach a final determination in the premises. Subsequently, on April 28, 1938, the defendant filed a petition for rehearing directed to the order of the Commission bearing date of March 30, 1938, and the Commission on May 27, 1938, entered its further order vacating its prior order of March 30, 1938, reopening the proceedings for further investigation into the charges made by Philadelphia Electric Company to Delaware Power & Light Company preliminary to further action by the Commission, and dismissing the petition for rehearing filed by defendant.

The record in this case shows that electric energy sold by Philadelphia Electric Company to Delaware Power & Light Company is not billed on a straight energy basis. The contract between the companies specified, as a basis for determining the monthly charges for energy delivered, a capacity demand charge of $1.3833 per kilowatt, an operating demand charge of 19.5 cents per kilowatt, and an energy charge of .3 cent per kilowatt hour. However, it is also provided that in determining the capacity demand, Delaware Power & Light Company shall receive credit, against measured demand, equal to the generating

capacity maintained, as cold standby under the terms of the agreement, at its Brandywine plant. Under this arrangement Delaware Power & Light Company receives a monthly credit for 12,200 kilowatts of demand. At $1.3833 per kilowatt, this credit equals $16,876.26 per month, or $202,515.12 annually. The contractual arrangements between Philadelphia Electric Company and Delaware Power & Light Company also provide for the sale and delivery of electric power and energy to Worth Steel Company upon a special basis, although served directly by Delaware Power & Light Company. In the determination of the basic sales price of electric energy sold by Philadelphia Electric Company to Delaware Power & Light Company, consideration must be given to the credit received by the Delaware Power & Light Company because of the maintenance by it of cold standby capacity at its Brandywine plant and energy transactions and charges relating to the service furnished Worth Steel Company, under a special arrangement, must be excluded from such computation. When these adjustments are made it is found that Philadelphia Electric Company delivered to Delaware Power & Light Company during 1936, 157,226,985 kilowatt hours of electric energy with a straight contract price of $984,323.44, or 6.26 mills per kilowatt hour. It is this sale price which must be taken into consideration in determining whether Philadelphia Electric Company sells and delivers electric energy to Delaware Power & Light Company below cost and whether sales on such a basis are prejudicial to domestic consumers in the intrastate area served by Philadelphia Electric Company.

[1] The Commission recognizes the fact that it is manifestly impossible for an individual complainant to make out a prima facie case in a rate controversy such as that pending before the Commission in this proceeding. An individual complainant seldom, if ever, has the necessary funds to finance the investigation and prosecution of such a case. When it can be demonstrated by the complainant, or the Commission finds, as the result of a preliminary investigation, that there is reasonable justification or probable cause for the complaint and that the public interest will be served by prosecuting the necessary inquiry and investigation into the matters complained of, then the Commission will take all necessary action to determine and assemble relevant facts and information that may be required to enable it to consider and decide the issues presented by the complaint. If, on the other hand, the showing made by the complainant or the results of the preliminary investigation by the Commission should show that the complaint is without justification or basis in fact, then there can be no reason to promote further inquiry or investigation.

[2, 3] Data and information submitted of record in this case by the complainant do not furnish a full and complete basis for determining the cost to Philadelphia Electric Company of supplying electric energy to Delaware Power & Light Company, but the Commission has inquired into the relevant facts and information necessary to determine such cost through independent investigations conducted

by its own engineers and accountants. The preliminary investigation and survey made by engineers and accountants of the Commission shows that the Philadelphia Electric Company is not selling electric power and energy to Delaware Power & Light Company at less than the cost of generation and transmission, including other appropriate expense; that the price received by the Philadelphia Electric Company for the energy sold represents a substantial return upon the property devoted to the service required to generate and deliver the electric energy sold to Delaware Power & Light Company. Since these facts are clearly apparent, further investigation and inquiry into the matters involved in this case cannot be justified.

If the Commission had found, as a result of the investigations made, that Philadelphia Electric Company was selling electric power and energy to Delaware Power & Light Company at less than cost or that such sales, at the rates in effect, were in violation of the provisions of § 205 (b) of the Federal Power Act, the defendant, Philadelphia Electric Company, could have been required by order to submit full and complete information, data, and reports relating to its property, investment, and expense in serving Delaware Power & Light Company. Furthermore, the Commission, to the extent necessary to assemble all pertinent and relevant facts, would have made such other and further field investigations and studies as might have been necessary.

The Federal Power Commission, however, has no power or authority to remove unjust discrimination which may be the result of rates charged by the Philadelphia Electric Company to its intrastate domestic consumers to which class of consumers the complainant belongs. Section 206 (a) of the Federal Power Act provides that when the Federal Power Commission finds that undue discrimination exists, it shall fix, by order, the rates and charges to be thereafter observed and in force with respect to the sale or transmission of electric energy subject to its jurisdiction. The complaint says, in effect, that the rates and charges assessed and collected by Philadelphia Electric Company for electric energy sold to Delaware Power & Light Company are too low and should be increased in order that discrimination against domestic consumers in Philadelphia may be removed. However, since it clearly appears to the Commission that the interstate rates charged by Philadelphia Electric Company to Delaware Power & Light Company are not unreasonably low or less than the cost of generating, transmitting, and supplying electric energy to Delaware Power & Light Company, and, in fact, provide a substantial return on the investment, it follows that there is no basis upon which to predicate a finding of undue discrimination under the provisions of the Federal Power Act.

An appropriate order will be entered dismissing the complaint without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Re The Associated Broadcasters, Incorporated (KSFO) et al.

(Docket No. 4208.)

Radio, § 7 — License — Right to renew — Ability to transfer.

1. A radio station license is a personal privilege and not transferable without the consent of the Commission, and the licensee has a continuing right to apply at proper times for successive renewals of his license, p. 385.

Radio, § 7 — License — Assignment — Rights of assignor.

2. Assignor of a broadcast station license can have no continuing right in applying for renewals of said license nor any right in the license existing at the time of the expiration of the lease, since to recognize such rights in the assignor would be tantamount to the recognition of an outsider to the use of a frequency at a future time, p. 385.

Rates, § 7 — License — Assignment — Invalid leases.

3. The assignment of a radio station license under a lease which contains provisions assuring the lessor of renewals of license and assuring the lessor of the possession of the station license existing at the termination of the lease is contrary to the Communications Act and not in the public interest, p. 385.

(BROWN, Commissioner, concurs in separate opinion.)

[October 18, 1938.]

JOINT *application for consent to assignment of a radio station license; denied.*

APPEARANCES: D. M. Patrick and Joseph H. Reams, on behalf of applicant; and George B. Porter and Frank U. Fletcher, on behalf of the Commission.

By the COMMISSION:

Preliminary Statement

The Associated Broadcasters, Inc., is a corporation organized and existing under the laws of the state of California. It is licensed to operate a radio station known by the call letters KSFO in the city of San Francisco on the frequency 560 kilocycles, with a power output of 1,000 watts and unlimited hours of operation.

Western Broadcasting Company (now incorporated as Columbia Broadcasting System of California, Inc.) is a corporation organized and existing under the laws of California.

This proceeding arose upon the joint application of The Associated Broadcasters, Inc., licensee of Station KSFO, and Western Broadcasting Company (now known as Columbia Broadcasting System of California, Inc.) (5 B–R–27) as amended, for

consent to assignment of radio station license to Columbia Broadcasting of California, Inc.

The Commission was unable to determine from an examination of this application, as amended, that the granting thereof would serve public interest, convenience, and necessity, or that the same might be granted within the purview of § 310 of the Communications Act of 1934 (48 Stat. 1086 [47 USCA § 310]), and, accordingly, designated the same for a public hearing, of which due notice was given the applicant and other interested parties. Thereafter, and on December 2, 1936, in accordance with said notice, the hearing was held before an examiner, who, on April 6, 1937, submitted his report (I–399) recommending that the application be denied.

Exceptions to the examiner's report were filed and a request made for oral argument by Associated Broadcasters, Inc., Columbia Broadcasting System of California, Inc., and Columbia Broadcasting System, Inc. Oral argument was had before the broadcast division July 1, 1937, and again, before the Commission en banc, January 14, 1938.

The exceptions raise no questions not considered in a determination of this application upon its merits.

Statement of Facts

The original cost of all equipment including antenna system, transmitting apparatus, and studio equipment of Station KSFO is $35,224.26. The transmitter and antenna are twelve or thirteen years old. The speech input equipment is six years old. The studio equipment was acquired in 1932. The present cost of equivalent equipment is $38,865.09. Depreciation of $8,733.13 was subtracted from the present cost of equivalent equipment, leaving a depreciated value of the property at $30,131.96.

Station KSFO is now and has been operating as an independent station, though the licensee at one time exchanged programs in an experimental hookup with KNX, Los Angeles, this arrangement being continued over a period of several months. Program schedules of KSFO of recent date show diversified headings, methods of production, and commercial sponsorship.

Net profit for the period of January 1 to June 30, 1936, is $867.65. The owner of the capital stock of licensee corporation drew $1,000 a month as salary from the station during the period of the statement submitted. Subsequent to June 30, 1936, the business showed an increase in profits of $1,000 to $1,500 per month.

Columbia Broadcasting System of California, Inc., is a subsidiary of Columbia Broadcasting System, Inc., of New York. None of the officers or directors of this corporation is an alien; and not more than one-fifth of the capital stock of said corporation is owned of record or voted by aliens or their representatives.

The assets of Western Broadcasting Company (now Columbia Broadcasting System of California) as of June 30, 1936, totaled $449,861.34. The net worth of that company as of that date was $301,808.20. The total assets of the Columbia Broadcasting System, Inc., and subsidiary companies as of July 25, 1936, was $10,748,331.29 and its net worth was $7,411,-

573.66. No new stock issue is contemplated. The transferee is qualified financially to continue the operation of Station KSFO.

In 1928 the Columbia System was a relatively small network of 16 stations on the eastern seaboard with some few outlets in the Middle West but in no wise a coast-to-coast project. In order to extend the service of the network, arrangements were made with the Don Lee Broadcasting Company, which then operated three stations in California. The Don Lee organization has since acted as Columbia's west coast representative, but this association is being terminated. As a matter of policy, the Columbia System is undertaking to do more and more of the detail work connected with the maintenance and operation of its west coast stations. The geographical separation between the east and west coasts, the difference in time zones, special requirements of advertisers in the centers of industry and population on the west coast and unique opportunities to obtain talent, particularly from the moving picture industry at Los Angeles, make it desirable to the Columbia System to have a west coast organization.

The following stations are either owned or operated by Columbia Broadcasting System, Inc., directly, or through the agency of subsidiaries:

Call Letters	Address	Frequency	Power
WABC } WBOQ }	New York, N. Y.	860	50 kw
WJSV	Washington, D. C.	1460	10 kw
WBT	Charlotte, N. C.	1080	50 kw
WKRC	Cincinnati, Ohio	550	1 kw, 5 kw-LS
KMOX	St. Louis, Mo.	1090	50 kw
WBBM	Chicago, Ill.	770	50 kw
WCCO	Minneapolis, Minn.	810	50 kw
KNX	Los Angeles, Cal.	1050	50 kw.

Station WEEI (590 kilocycles, 1 kilowatt) Boston, Massachusetts, is operated by the same interests under a lease agreement.

Columbia Broadcasting System, Inc., plans to acquire the licenses of all stations operated through the instrumentality of its subsidiaries and that plan would include Station KSFO. Proposed plans include organization of and arranging for the establishment of offices in California with various departments which go to make up the service part of the broadcast network including sales, production, engineering, sales promotion, artists, and publicity. Additional physical facilities and personnel necessary to organize and broadcast products of a high standard over radio Station KSFO would be provided. The transferee is technically qualified to continue the operation of Station KSFO.

The transferee proposes to increase the basic rates of Station KSFO from $150 to $325 an hour. Based upon this increase in basic rates, estimates of the earning ability and possibilities of the station as a network unit were given as follows:

Estimated gross revenue	$280,000 per year
Expenses, including rent and depreciation on a new transmitter	250,000
Estimated net income	30,000 per year

Further plans of the assignee, Columbia Broadcasting System of California, Inc., include putting in new equipment (the present transmitter is to be used as an emergency auxiliary transmitter), changing the site of the present transmitter, and establishing studio and office facilities for not only local headquarters but also Columbia headquarters. The present studio is

to be used for a while, depending on where larger studios will be located. In other words, they plan to "revitalize the entire plant by putting in new equipment and everything that goes with it at a new location."

At the present time Station KFRC is carrying the programs of the Columbia Broadcasting System. The plan of the Columbia System is that Station KSFO will displace KFRC, and KSFO will be the only station carrying Columbia programs in San Francisco. The Columbia System proposes to broadcast approximately 1,650 hours a year of chain commercial programs and about 500 hours a year of local broadcasts.

Mr. W. I. Dumm, president of Associated Broadcasters, Inc., first interviewed officials of the Columbia Broadcasting System, Inc., in 1935, with the suggestion that Station KSFO be placed upon the Columbia Network and that the station be leased to Columbia. This original suggestion led to further negotiations between the parties which ultimately resulted in the execution of a lease-agreement. The agreement is dated June 26, 1936. The parties have made the agreement and an executed assignment of the station license a part of this record. The documents are required by the rules and regulations of the Commission to be filed with applications seeking authorization for the transfer of a station license. It is incumbent upon the Commission that it examine the lease-argeement and determine whether the provisions therein are fully within the Communications Act and not contrary to the public interest.

The expiration date of the agreement is fixed as January 1, 1942, subject, however, to the right of the lessee to successive renewals thereof for a period of five years each; the last renewal period not to extend beyond January 1, 1952.

The agreement contains a number of provisions pertaining to the equipment and other properties of the station. These provisions merely protect the property rights of the lessor and need not here be further considered. The agreement also contains provisions relating to the license renewals of the station and the future disposition thereof, and such provisions must be carefully scrutinized for the reasons heretofore stated. The provisions of the lease-agreement referred to are as follows:

"The lessee will make due and proper application at its expense for all operating licenses and permits required for the operation of Station KSFO during the term of this lease. In the event that it is necessary that applications for operating licenses and/or other applications, petitions, or procedural documents relating to the operation of Station KSFO be filed in the name of the lessor, the lessor will, at the request of the lessee, file such applications, petitions, or documents and will render such coöperation to the lessee as may be appropriate to the subject matter. The lessor shall have the right to intervene in any proceeding affecting Station KSFO and to engage counsel of its selection, at its own expense, who may participate with the lessee in any action or proceeding involving the license or properties of Station KSFO.

. . . . . .

"The lessee will make and duly prosecute due and proper application for

the reassignment to the lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease, and the lessee will, at the request of the lessor, file and duly prosecute such applications, petitions, or documents and will render such coöperation to the lessor as may be appropriate to the subject matter."

This agreement also contains a provision setting forth many contingencies upon which the lessor may reënter and take possession of the leased property without legal process and without being guilty of trespass. Thereupon, the provision mentioned continues as follows:

"The lessee and/or its assigns hereby irrevocably appoints the lessor its attorney-in-fact with full power upon such termination in its own name or in the name of the lessee and/or its assigns to execute all documents to effect an assignment of all licenses, permits and other assignable contracts relating to KSFO to lessor or its nominee."

The foregoing shows: (1) that although the lessor proposes to assign its license it claims and reserves the right to employ counsel and to enter into any action or proceeding involving the license to operate Station KSFO; (2) that the lessor binds the lessee to make "application for reassignment to the lessor of all operating licenses and permits required for the operation of Station KSFO at any termination of this lease"; and (3) that in case of default in the performance of the contract by the lessee the lessor may under power of attorney embodied in the contract, acting in the name of the lessee, assign to itself (the lessor) "all licenses, permits, and other assignable contracts relating to KSFO."

More specifically, the above lease provisions represent: (1) that the lessor is to be protected in the issuance of station license renewals during the period of the agreement; and (2) that the lessor is assured the possession of station license existing at the time the lease terminates.

The Communications Act of 1934 provides that a "station license shall not vest in the licensee any right . . . in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." 47 USCA § 309 (b) (1).

[1, 2] A broadcast station license is issued for a term of six months. The license is a personal privilege and not transferable without the consent of this Commission. The licensee has a continuing right to apply at proper times for successive renewals of his license. Technical Radio Laboratory v. Federal Radio Commission (1929) 59 App. D. C. 125, 36 F. (2d) 111, 113. In the present case, should the license for Station KSFO issue to the proposed assignee the assignor could have no continuing right in applying for renewals of said station license; nor could the assignor have any right in the station license existing at the time of the expiration of the lease. To recognize such a right in the assignor would be tantamount to the recognition of an outsider to the use of a frequency at a future time.

[3] Furthermore, the assignee of a station license operating under a lease-agreement which contains provisions reserving to the lessor assurance of station license renewals and the possession of the station license existing at

the termination of the lease, constitutes an arrangement which is misleading to the public generally, and particularly misleading to the investing public. This, for the reason that upon its face the lease indicates that with the termination thereof the station license then existing will vest in the lessor, which is contrary to the Communications Act. The lease provisions referred to may also mislead the parties to the lease; and the same provisions may restrain others from applying for the use of the frequency covered by the license should the assignee fail in its duty to the public or cease to operate the station licensed.

Prior to the enactment of the Communications Act, the Federal Radio Commission authorized the M. A. Leese Radio Corporation to assign its license for radio Station WMAL to the National Broadcasting Company, Inc. At the time of assignment of the station license the National Broadcasting Company, Inc., executed a lease-agreement with the owners of Station WMAL which contains provisions assuring the lessor of license renewals and possession of the license that exists at the time the lease terminates. These provisions are similar to the provisions contained in the lease-agreement between the parties herein.

The Federal Communications Commission on April 20, 1938, in a per curiam opinion relating to the transfer of stock of the M. A. Leese Radio Corporation to The Evening Star Newspaper Company, stated its position as to the above provisions of the lease arrangement between the M. A. Leese Radio Corporation and the National Broadcasting Company as follows:

"And it appearing that the transfer of control of M. A. Leese Radio Corporation does not directly involve a transfer of a station license, the frequencies authorized to be used by the licensee, or the rights therein granted, for the reason that M. A. Leese Radio Corporation does not have any such rights to transfer, having heretofore assigned the license of Station WMAL, including the frequencies and all the rights therein granted, to the National Broadcasting Company; and that since said transfer this Commission has granted renewals of said license, no reasons for failure to renew having been made to appear, to the National Broadcasting Company;

"And it appearing that upon the expiration of the lease between said M. A. Leese Radio Corporation and the National Broadcasting Company, Inc., neither the license nor any rights therein will revert to the M. A. Leese Radio Corporation or its assignees, or The Evening Star Newspaper Company as a stockholder therein;

"And it appearing that the assignment of license from the said M. A. Leese Radio Corporation to National Broadcasting Company pursuant to the lease agreement did not, could not, and does not operate as approval of or consent to the terms of said agreement as such, nor is it in any wise an acceptance or recognition of any rights, equities, or priorities of the M. A. Leese Radio Corporation, or its assignees, or any of the stockholders thereof so far as the license of broadcast Station WMAL is concerned";

This Commission now finds that lease provisions assuring the lessor of renewals of license, and/or assuring the lessor of the possession of the sta-

tion license existing at the termination of the lease, are contrary to the Communications Act and are not in the public interest.

This Commission and its predecessor (Federal Radio Commission), previous to this decision, has granted (without written opinion) authority for the assignment of licenses based on leases containing provisions that are found herein to be contrary to the Communications Act and not in the public interest. In approving these assignments the Commission accepted the lessee as one stepping into the shoes of the lessor with the same privileges and responsibilities; and it was the opinion of the Commission that its approval of an assignment did not carry with it approval of the provisions of the lease beyond the mere transfer of the license. Experience has shown, however, that this construction may mislead the public in general, as well as the parties to the lease agreements.

In the case of M. A. Leese Radio Corporation, *supra,* this Commission without the lessee before it, gave notice that no station license privileges would be recognized in the "M. A. Leese Radio Corporation, or its assigns, or any of the stockholders thereof." This was tantamount to saying that provisions in the lease under which the National Broadcasting Company operates Station WMAL, assuring the lessor of station license renewals and the possession of the station license existing at the time the lease terminates, could not and would not be binding upon the Commission. If any action of this Commission or action of its predecessor, the Federal Radio Commission, in granting an assignment of a station license, may be construed as an approval of lease provisions, assuring the lessor of station license renewals and/or the possession of the license existing at the termination of the lease, then to that extent said actions are hereby overruled.

Grounds for Decision

On the record in this case the Commission finds:

1. The provisions of the lease-agreement between the applicants herein, providing assurance to the lessor of license renewals for Station KSFO and assurance of possession in the lessor of the license of said station existing at the termination of the lease, are in conflict with provisions of the Communications Act and not in the public interest;

2. A grant of the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to assign the license of Station KSFO under the provisions of the lease-agreement of June 26, 1936 between said parties, is contrary to §§ 309 (b) (1) and 310 (b) of the Communications Act of 1934;

3. The proposed transferee is legally, financially, and otherwise qualified as a licensee of Station KSFO but the provisions of the lease-agreement under which it would operate said station, assuring the transferor license renewals and the possession of the existing station license at the termination of the lease precludes the finding that the assignment of the license would serve public interest, convenience, and necessity.

4. A grant of the joint application of The Associated Broadcasters, Inc., and the Columbia Broadcasting Sys-

tem of California, Inc., for consent to assign the license of Station KSFO is not in the public interest.

ORDER

Upon consideration of the entire record, it is *ordered:*

That the joint application of The Associated Broadcasters, Inc., and Columbia Broadcasting System of California, Inc., for consent to voluntary assignment of license of Station KSFO to Columbia Broadcasting System of California, Inc. (Docket No. 4208), be, and it is hereby, denied.

BROWN, Commissioner, concurring: I concur with the result reached by the majority of the Commission in this case, but I cannot subscribe to the reasons advanced by them for denial of the application.

The majority have advanced for the first time the opinion that a contract of lease, which binds the lessee to make application for reassignment of the license to the lessor upon the expiration of the lease, is "contrary to the Communications Act and not in the public interest."

Section 301 of the act (47 USCA § 301) provides: ". . . No person shall use or operate any apparatus for the transmission of . . . communications . . . by radio . . . except under and in accordance with this act and with a license in that behalf granted under the provisions of this act."

In making application to this Commission for a license, an applicant has the burden of showing that he has possession of and the right, without restriction, to *use or operate* certain described apparatus for the period of the license applied for. The license period is fixed at six months by regulation and this Commission may not grant a license for a period in excess of three years (§ 307 (d)). Ownership of equipment is not required. It is sufficient if an applicant shows that he is in possession of certain equipment by virtue of a lease, sale, or other arrangement and that he will be in possession of such equipment during the term of the license. This, certainly, the applicant in this case had demonstrated.

Sections 301 and 309 (b) (1) prevent the assertion by a licensee of any right in the license beyond its terms. The holding of a license may not vest in the licensee any right to operate the station or any right to the use of the frequencies designated beyond the terms and conditions of such license. And § 310 (b) prevents the transfer of a license without Commission consent in writing. The parties in this case have agreed to make application for reassignment of the license to the lessor upon termination of the lease. In one sense they have attempted to determine the right to use the frequency *as between themselves.* But certainly this assertion would have no effect upon the power of the Commission. As to this Commission and its powers and duties under the Communications Act, the provision must be simply a nullity.

I am unable to see how the granting of consent to the assignment of license as proposed could possibly be construed as an approval of a thing which the law (§§ 301 and 309) specifically negatives. Even if it be assumed that the parties have asserted a right as against the Commission, we

cannot by our action repeal the express provisions of the statute.

Moreover, §§ 303, 308, 309, 312, and others of the Communications Act confer upon this Commission broad regulatory powers with respect to the original issuance or subsequent modification, revocation, or renewal of licenses. These broad powers are specific and they recognize that in the interest of the public the Commission may at any time, upon sufficient reason being shown, modify, revoke, or refuse a license. Again, we may not by our action repeal these provisions of the statute.

Section 310(b) of the Federal Communications Act of 1934 (47 USCA § 310(b)) governs the transfer of licenses:

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted *shall not be transferred, assigned,* or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest,* and shall give its consent in writing." (Italics supplied.)

The public interest, therefore, is the standard we must apply in this case. I fail to follow the reasoning of the majority that the reversionary provision in the lease is per se contrary to the public interest. It is difficult to see how the public in this case would be harmed by the fact that the proposed assignee would operate his station with equipment leased rather than purchased. The public is interested in the continued operation of the station and the continued improvement of its technical service and programs, but unless such are jeopardized by some provision of the instrument of conveyance, the exact form whether lease, sale, or gift, is unimportant. Where a fact appearing in the record has no reasonable or proximate effect upon the programs or service of the station, the public interest is not concerned.

There are aspects of this case other than those assigned by the majority because of which I concur in the denial of the application. The sole test is whether the granting of the instant application would serve the public interest. From the record, I am unable to find that any benefit whatever would be derived by the public if this application be granted. The public will have the benefit of the present programs carried by Station KSFO and, in addition, will not be denied Columbia Broadcasting System's programs, which are now being carried by Station KFRC. I am, therefore, content in this case to ground my decision upon the fact that the applicant has failed to show sufficient reasons in the public interest to warrant the granting of this application.

MONTANA BOARD OF RAILROAD COMMISSIONERS

Re Chicago, Milwaukee, St. Paul & Pacific Railroad Company

[Docket No. 2883, Report and Order No. 1732.]

Service, § 267 — Discontinuance — Railroad station — Losses.

1. The Board may require a railroad to maintain a station and to furnish essential accommodations and facilities in relation thereto if reasonably necessary for the public convenience, even though a loss will be sustained by the railroad in connection therewith, p. 392.

Service, § 267 — Abandonment of stations — Evidence — Balancing of conveniences.

2. The Board, in determining whether or not railroad stations should be abandoned and discontinued, must decide each case upon its own particular facts, and unless the evidence shows that the station is absolutely essential to public welfare and not merely convenient, then there must be balanced the relative expense to the road against the relative convenience to the public, p. 392.

Service, § 267 — Discontinuance — Stations — Loss of revenue.

3. Loss of revenue has some bearing on the nonperformance of the duty to provide railroad stations and adequate facilities in connection therewith, since this duty goes to the convenience of the public and may not be absolutely essential, p. 392.

Service, § 267 — Abandonment of stations — Evidence — Losses.

4. Evidence showing that a railroad is losing revenue at a station which it wishes to abandon, without due regard to the railroad's duty in serving the public, is wholly insufficient to authorize the Board to approve the abandonment of such station, p. 393.

Service, § 267 — Abandonment of stations — Losses.

5. The Board may refuse to authorize a railroad to close one of its stations where the expense involved in maintaining such station will not be so unreasonably out of proportion to the convenience afforded to the public as to impose an unlawful burden upon the railroad, p. 393.

Service, § 267 — Abandonment of stations — Prospective business.

6. The Board may properly consider evidence of prospective business at a railroad station along with evidence as to the loss of revenue in determining whether or not the railroad should be allowed to close that station, p. 393.

[November 16, 1938.]

APPLICATION *for authority and permission to discontinue a railroad station; dismissed.*

APPEARANCES: L. K. Sorensen, Superintendent, Butte, and C. S. Winship, Freight and Passenger Agent, Great Falls, for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; G. A. Gilpatrick, representing Hilger Community Club, Hilger, for the protestants; John W. Bonner, Counsel, Helena, for the Board.

By the COMMISSION: Heretofore the Chicago, Milwaukee, St. Paul and Pacific Railroad Company filed with us an application for an order authorizing and permitting it to discontinue its agency at Hilger, Montana. Pursuant to said application and upon proper notice to the Railroad Company and the public, the matter was set for hearing at Hilger, Montana, on August 30, 1938. At the hearing, evidence was introduced by both the applicant and the protestants.

Hilger, Montana, is located on a branch line of the applicant and is in Fergus county. It is the only station between Lewistown and Roy, and between Lewistown and Winifred. The applicant has a passing track and an industry track, along which is located an elevator, owned by the Case Grain Company, one stockyard and loading and unloading chute. All United States mail and less than car-load shipments of freight and express are handled by the Stendal Transportation Company of Lewistown, and the only train service on the branch line to Roy and Winifred is on such days as car-load shipments warrant such service. For some time past before the hearing herein, the elevators in and about Hilger were not open for business and shipments of grain from around Hilger were transported, for the most part, by truck to Lewistown.

The population of the town of Hilger is approximately one hundred persons but the town is located in the heart of what is known as one of the best wheat countries in Montana and during good times, in addition to wheat shipments, a great number of stock is shipped from Hilger. It must be understood that the applicant serves a large farming and stock district around Hilger, which territory has a population of approximately 1,500 persons.

The territory in and about Hilger has heretofore suffered a severe drouth, which has resulted in a decrease of production, both as to farming commodities and as to live stock. The evidence submitted by the protestants went to show that when times were good the applicant received most of the shipments from the farmers and stockmen and that since the drouth, the live-stock men are attempting to restock their ranches and, as a consequence, the applicant will be benefited thereby. In addition to this, the protestants stated that if we were to approve the application for abandoning the station at Hilger, there would be approximately 40 miles on applicant's route which would be without station facilities and that it would be inconvenient for the farmers and stockmen to go to Lewistown to ship or to receive live stock, farm products, and other commodities.

At the time of the hearing the territory served by the station of Hilger had the best prospects in years for a fine wheat crop. Our investigation shows that these prospects were well founded and that this territory pro-

duced one of the heaviest crops that it has experienced in years. In the vicinity of Hilger, approximately 6,490 acres of wheat were harvested. All of the protestants' evidence went to show that the applicant would receive the benefit of the wheat shipments and that, because of the fine prospective conditions in that territory for live stock and crops, we should not approve the closing of the station by the applicant.

The applicant introduced in evidence a statement showing its revenues and expenses for its station at Hilger. The statement, however, does not include any business done in some of the territory which is handled by the Hilger agency. One of the witnesses for the applicant admitted that the applicant had made no statement for anticipated revenue for the coming year but that it expected to have a considerable increase in its earnings over those of last year because of the good crop conditions in this territory.

It should be further observed that applicant did not attempt to show whether its other stations in Montana or elsewhere were losing or making money. The statement submitted by applicant does show that the railroad company is losing some money because of maintaining the station at Hilger and was content to rest its case on this statement without attempting, in any way, to give this Board additional information.

[1] There is no question but that this Board may require a railroad to maintain a station and to furnish essential accommodations and facilities in relation thereto, even though a loss will be sustained by the road in connection therewith if the maintenance of such a station and the furnishing of essential accommodations and facilities in relation thereto are reasonably necessary for the public convenience. State ex rel. Burr v. Seaboard Air Line R. Co. (1927) 92 Fla. 1139, 111 So. 281, 735, certiorari dismissed (1927) 275 U. S. 574, 72 L. ed. 434, 48 S. Ct. 17.

[2] Especially is this so where, as here, the applicant merely showed loss of revenue as to the station in question without any showing as to whether or not the public would be inconvenienced by the closing of said station. In determining whether or not stations should be abandoned and discontinued each case must be decided upon its own particular facts and unless the evidence shows that the station is absolutely essential to public welfare and not merely convenient, then there must be balanced the relative expense to the road against the relative convenience to the public. State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co. 77 Fla. 366, P.U.R. 1919D, 692, 81 So. 498.

[3] It should be noted that there is a distinction in the duties which a railroad company owes to the public. We may safely say that it is essential to the public welfare that the railroads provide fit and suitable roadbeds, tracks and equipment, a duty which is essentially different than the railroad's duty to provide stations and adequate facilities in connection therewith. This latter duty goes to the convenience of the public and may not be absolutely essential, while the former duty is, of course, essential, in that it goes to insure the safety and property of the patrons of the railroads.

It follows therefore that the loss of revenue is no excuse for nonperformance of the former duty, while it does have some bearing on the nonperformance of the latter duty of the railroad.

[4] We are not unmindful of the fact that the railroads must practice economies in some manner in order to adjust their present financial difficulties. In practicing these economies, undoubtedly it is necessary for the railroads to abandon and discontinue stations which no longer serve public convenience and necessity. Furthermore, regulating boards should not, in our opinion, refuse to allow the railroads to abandon such stations when the railroads can profit thereby and the public will not be inconvenienced. However, all facts should be taken into consideration and where the railroad, as it has done here, contented itself merely with evidence showing a loss of revenue at the station which it wishes to abandon, without due regard to its duty in serving the public, such evidence is wholly insufficient to authorize us to approve its petition for abandonment.

[5] We believe in this case that if the applicant maintains the station involved that its expense in so doing will not be so unreasonably out of proportion to the convenience afforded to the public as to impose an unlawful burden upon the applicant, a fact which authorizes us to refuse to grant applicant the right to close its station. State ex rel. Railroad Comrs. v. Florida East Coast R. Co. (1914) 67 Fla. 83, 100, 64 So. 443.

[6] As heretofore shown, the evidence of the protestants, which was not disputed, shows that the prospective business at the station of Hilger will become better and afford the applicant increased revenue. Where this is so, we may properly consider this prospective public business in determining whether or not applicant should be allowed to close its station in connection with the evidence applicant introduced as to the loss of revenue. Smith v. Seaboard Air-Line R. Co. (1912) 10 Ga. App. 227, 73 S. E. 523.

It is our opinion, after weighing all of the pertinent facts relating to the present application, that it should not be approved and we, therefore, are obliged to dismiss the same.

An appropriate order will be entered.

MONTANA PUBLIC SERVICE COMMISSION

Re Great Northern Utilities Company

[Docket No. 2736, Report and Order No. 1737.]

Rates, § 190 — Presumption of reasonableness — Evidence of unreasonableness.

1. Existing utility rates filed and approved by the Commission must be presumed reasonable and should not be disturbed except upon clear and convincing evidence that they are unreasonable, p. 395.

Rates, § 42 — Commission approval — Public hearing.

2. The Commission cannot approve a rate increase without a public hearing, p. 395.

Valuation, § 45 — Rate base — Assessed valuation — Evidence.

3. The Commission, in arriving at the rate base, will take notice of the assessed valuation of the utility, but it will not give such evidence any greater weight than other evidence introduced in the case, p. 395.

Valuation, § 17 — Rate base.

4. No hard and fast rule can be safely laid down for fixing the value of a public utility for rate-making purposes, p. 396.

Return, § 9 — Fair and reasonable — Fair value basis.

5. A utility is entitled to earn a fair and reasonable return upon the present value of its property used and useful in the public service, p. 396.

Return, § 15 — Reasonableness.

6. The Commission must consider each case upon its own peculiar facts in determining whether or not a utility is earning a fair and reasonable return upon the present value of its property, used and useful in the public service, p. 396.

Rates, § 180 — Laches — Rate increase — Status quo.

7. The mere fact that a utility has not asked for an increase in rates for a long period of time is not in itself sufficient reason to deny such an increase if the facts warrant it, but to allow a utility that has slept on its right to a rate increase over a period of years, if it in fact does have any such right to increase its rates suddenly, so as to put it in a status quo is to be unfair to the utility and to its patrons as well, p. 396.

Return, § 43 — Reasonableness — Past losses — Amortization of deficit.

8. The Commission, in determining whether or not a rate is reasonable or unreasonable, cannot take into consideration the past losses of the utility, and the fact that it has operated at a loss in prior years does not entitle it to an unreasonable rate of return for the future in order to amortize or make up for the past deficit, p. 397.

Return, § 43 — Return in past — Reasonableness of present rates.

9. The fact that a utility has made a reasonable return in the past does not require it to operate in the future under a rate that is not reasonable, p. 397.

Expenses, § 118 — Uncollectible accounts.

10. Uncollectible accounts must be considered in determining whether or not a utility is making a reasonable or unreasonable rate of return, even though such accounts are not charged to operating expenses, p. 398.

Expenses, § 118 — Recoupment of losses — Delinquent customers.

11. Rates should not be fixed high enough to enable a utility to recoup losses from delinquent customers, p. 398.

Expenses, § 118 — Uncollectible accounts.

12. The Commission should not simply establish an arbitrary percentage for all cases to be allowed for uncollectibles, but rather such percentage should be arrived at under the facts of each case in rate investigations, p. 398.

[December 2, 1938.]

RE GREAT NORTHERN UTILITIES CO.

APPLICATION *for approval of schedule increasing gas rates; schedule disapproved and rate increase as prescribed by the Commission approved.*

APPEARANCES: Donovan and Donovan, Attorneys, Shelby, and E. G. Toomey, Attorney, Helena, for the Great Northern Utilities Company, a corporation; Cedor B. Aronow, Attorney, Shelby, for the protestants; John W. Bonner, Counsel, Helena, for the Commission.

By the COMMISSION: Heretofore the Great Northern Utilities Company submitted for our approval Schedule 6-A canceling Schedule 5-A. Schedule 5-A reads as follows: [Schedules omitted.]

It is apparent that in asking us to approve Schedule 6-A the utility is asking us to approve a much higher rate than is now approved by this Commission as shown by Schedule 5-A.

The Great Northern Utilities is engaged in the business of furnishing natural gas to the inhabitants of the city of Shelby, Montana. This utility's competitor in the same town is the Citizens Gas Company. Heretofore there has existed more or less of a rate war between these utilities and in 1929 because of their practices this Commission attempted to regulate their rates in a just and reasonable manner. Public Service Commission v. Great Northern Utilities Co. Report and Order No. 1530 (P.U.R.1929B, 176). The matter finally reached our supreme court in the case of Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, P.U.R. 1930E, 134, 293 Pac. 294, and other courts. Litigation did not terminate until the early part of 1933. The utility resisted our increasing its rates, claiming them to be reasonable under the circumstances then existing. In this regard see Re Citizens Gas Co. (1938) 31 M. U. R. —, 26 P.U.R. (N.S.) —, *post.*

The present Schedule 5-A was approved by this Commission on June 17, 1933. Prior to that time the only legal schedule for this utility was Schedule 3-A which reads as follows: [Schedule omitted.]

[1] Existing rates filed and approved by this Commission must be presumed reasonable since in filing and approving Schedule 5-A the utility and this Commission must have been of the opinion at that time that the said schedule would yield to the utility a reasonable return upon its investment. Existing rates should not be disturbed except upon clear and convincing evidence that they are unreasonable. The utility did not in any way complain about this schedule until it filed with us on December 17, 1937, its proposed Schedule 6-A for our approval.

[2] This Commission in our opinion is not empowered to approve a rate increase without a public hearing. We therefore held a public hearing after due and lawful notice to the utility and the public at Shelby, Montana, on March 29, 1938, to determine whether or not we should approve the rates enumerated in Schedule 6-A.

[3] At the hearing considerable

evidence was introduced both by the utility and those who opposed our approving the said schedule. The utility claimed and this evidence was not disputed that though this Commission heretofore determined in Report and Order No. 1530, *supra,* that the utility's property used and useful which was devoted to natural gas service for the convenience of the public on January 1, 1928, was $43,214.22 that because of additions since that time the present value of the property as of January 1, 1938, amounted to $47,608. The utility in its entirety, including fixtures and supplies, was assessed at $15,951 for the year 1937. In arriving at the rate base in any case, while we take notice of the assessed valuation of the utility as we are authorized to do (§ 3884, Rev. Codes Mont. 1935), nevertheless we do not give this evidence any greater weight than other evidence introduced in the case. We do, however, take into consideration the experience that we have gained as members of the Commission and what the records of this particular utility show, which are filed in our office. Re Horning (1938) 31 M. U. R. —, 24 P.U.R.(N.S.) 462. Considering all pertinent elements the present value of the utility undoubtedly would not exceed $40,000. Operating expenses for the year 1937 totaled $22,421.81 and the revenues derived from the operation of the utility totaled $13,994.76 for the same year. The utility has 347 customers. The utility's annual report for 1936 shows that its uncollectible accounts amount to $13,405.48 and 1937 its uncollectible accounts have increased to $16,028.31.

[4, 5] No hard and fast rule can be safely laid down for fixing the value of a public utility for rate-making purposes. Petersburg Gas Co. v. Petersburg, 132 Va. 82, P.U.R. 1922C, 172, 110 S. E. 533. However, this Commission has held that a utility is entitled to earn a fair and reasonable return upon the present value of its property, used and useful in the public service. Re Big Horn Oil & Gas Develop. Co. (1938) 31 M. U. R. —, 27 P.U.R.(N.S.) —; Miles City v. Montana-Dakota Utilities Co. (1938) 31 M. U. R. —, 26 P.U.R. (N.S.) 358; Consumers v. Saltese Electric Light & Water Co. (1938) 31 M. U. R. —, 26 P.U.R.(N.S.) 333; Re Thompson Falls (1938) 22 P.U.R. (N.S.) 337; Re Horning, *supra.* See also Great Northern Utilities Co. v. Public Service Commission, *supra.*

[6, 7] In determining whether or not a utility is earning a fair and reasonable return upon the present value of its property, used and useful in the public service, each case must stand upon its own peculiar facts. Here the utility has been content to be governed by Schedule 5-A since June 17, 1933, until December 17, 1937, when it asked that its rates be increased. There is nothing in the evidence to show that conditions have substantially changed as far as the operation of the utility is concerned between the dates mentioned. While we realize that in an ordinary case the mere fact that a utility has not asked for an increase in rates for a long period of time is not in itself sufficient reason to deny such an increase if the facts warrant it, nevertheless we do not believe it to be good business that a utility sleep on its rights for rate increases over a period of years if it

does in fact have any such rights. A utility should at all times be alert and should not lose money because of insufficient rates over a period of years and then suddenly ask a Commission to approve a rate which will put it in status quo. To allow such a procedure is to be unfair to the utility and to its patrons as well. Such a condition should not be tolerated even though a utility is engaged in a rate war.

[8, 9] If this utility has lost money during the past several years, the fact remains that this Commission in determining whether or not a rate is reasonable or unreasonable cannot take into consideration the past losses of the utility, and the fact that it has operated at a loss in prior years does not entitle it to an unreasonable rate of return for the future in order to amortize or make up for the past deficit. Georgia R. & Power Co. v. Georgia R. Commission, 262 U. S. 625, 67 L. ed. 1144, P.U.R.1923D, 1, 43 S. Ct. 680; State ex rel. Capital City Water Co. v. Public Service Commission (1923) 298 Mo. 524, 252 S. W. 446; Minneapolis v. Rand (1923) 285 Fed. 818. Conversely we have heretofore held that the fact that a utility has made in the past a reasonable return does not require it to operate in the future under a rate that is not reasonable. Consumers v. Saltese Electric Light & Water Co. *supra*.

We believe that the uncollectible accounts of this utility are exceedingly unreasonable. There is no breakdown to show just what condition these accounts are in. Where a utility had uncollectible accounts which we felt were out of reason as here, we said:

"Charges for uncollectible accounts should not be allowed as an item of operating expense, unless the accounts are in reason uncollectible, since the public utility must employ more than ordinary diligence to collect the sums due it, because rates are prescribed on the principle that each consumer and each class of consumer must bear its just share of the costs of service. Libby v. Libby Water & Electric Co. (Mont.) P.U.R.1922E, 402. Under the rules of this Commission each utility may require from any consumer or prospective consumer a deposit intended to guarantee payment of bills. In this case there is nothing in the record to justify such an item for uncollectible accounts. In fact, some of the accounts classed as uncollectible are secured by notes and others are paid. As to the remaining uncollectible accounts, we have no idea as to why they are uncollectible.

"However, a delinquency in collecting accounts which shows an inexcusable indulgence on the part of the utility is not chargeable to the customers in general, where the company has the advantage of regulations designated to insure promptitude in payment and the burden for such uncollectible accounts should be upon the utility and not upon its patrons. Public Service Commission v. Great Northern Utilities Co. (Mont.) P.U.R.1929B, 176.

. . .

"To sum up, it is our opinion that consumers who pay their bills promptly should not be penalized by requiring them to bear excessive charges because of uncollectible accounts where a utility is permitted to require deposits under our rules as a protection against such accounts. Where justification is shown in a particular case, of course, a certain percentage may be

allowed for uncollectible accounts as circumstances warrant. However, because of the condition these accounts are in, under the evidence, we do not see how we can charge them off in determining this case." Re Horning (1938) 31 M. U. R. —, 24 P.U.R. (N.S.) 462, 472.

[10–12] It may be argued that the uncollectible accounts are not charged under operating expenses. However, uncollectible accounts represent a loss of revenue to the utility. In determining whether or not a utility is making a reasonable or unreasonable rate of return these accounts must be considered whether they are charged to operating expenses or otherwise. Technical methods of accounting will not eliminate them. Laxity in requiring deposits from consumers in order to procure business during a rate war or otherwise is no excuse for a utility to have an unreasonable item for uncollectible accounts. It is obvious that if this utility abides by our rules and regulations and the laws relating to uncollectible accounts in light of the rate increase granted it herein that it will undoubtedly make a reasonable return. Rates should not be fixed high enough to enable a utility to recoup losses from delinquent customers. Re Light, Fuel & Power Co. (1917) 1 W. V. P. S. C. Decisions 439. It is unnecessary to cite the decisions as to what percentage should be allowed for uncollectible accounts since these decisions allow from ½ of 1 per cent on the estimated gross revenue for uncollectible revenue to as high as 2 per cent. However, in our opinion this Commission should not simply establish an arbitrary percentage for all cases to be allowed for uncollectibles but on the contrary such percentage should be arrived at under the facts of each case. We see no reason in this case why we should allow the utility more than 2 per cent per year of its gross revenues for uncollectibles.

We realize that there have been additions to the plant and after making a thorough study of this case we feel that if we grant the utility an increase of 5 cents which would make its rates 20 cents and the utility follows the law and our rules with diligence that such a rate will be sufficient to enable it to receive a fair return on its property used and useful in the public service under the principles of law relating thereto. We must require the utility to follow our rules and regulations relating to uncollectible accounts immediately and to require deposits from its customers to guarantee payments of accounts as provided for by our rules and regulations.

We venture no prophecy now, without absolute compliance by the utility with our rules as to whether the gas rates herein allowed will continue to be reasonable. In granting this increase we have taken into consideration the fact that a rate war has existed within the town of Shelby and we have this day approved a rate similar to the one here for this utility's competitor, namely, the Citizens Gas Company. It is hoped that these utilities will now proceed in a business-like way so that the utilities and their patrons may benefit thereby.

The rates herein allowed will become effective January 15, 1939.

An appropriate order will be entered.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Securities and Exchange Commission

v.

Associated Gas & Electric Company et al.

[No. 145.]

(99 F. (2d) 795.)

Security issues, § 1 — What constitutes sale — Delivery of modified certificate — Extension of maturity.

1. An investment certificate of a registered holding company, upon which is stamped a legend stating that a certain per cent of principal has been paid and that the holder thereof agrees to an extension of the date of maturity of the balance, is, when delivered to the holder of the old certificate, sold within the meaning of § 6 (a) of the Holding Company Act, 16 USCA § 79f (a), p. 401.

Security issues, § 1 — What constitutes issuance — Alteration of old certificate — Extension of maturity.

2. Delivery to a security holder of an investment certificate, after stamping thereon a legend stating that a certain per cent of the principal has been paid in consideration of the holder's agreeing to an extension of maturity of the unpaid portion, constitutes the issuance of a security, p. 401.

Security issues, § 38 — Necessity of declaration and authorization — Securities stamped to extend maturity date.

3. Issuance by a registered holding company of a security by stamping an old certificate to extend the maturity date is such an issuance of securities as requires the filing of a declaration under § 7 of the Holding Company Act, 15 USCA § 79g, and an order of the Commission is necessary to render the new certificate lawful, p. 401.

Security issues, § 38 — Necessity of Commission authority — Statutory requirements — Holding companies.

4. Supervision granted to the Securities and Exchange Commission over arrangements to extend the maturity of securities, by § 12 (e) of the Holding Company Act, 15 USCA § 79l (e), aimed at regulating the solicitation of proxies, does not conflict with the provisions of the law requiring the filing of a declaration and an order of the Commission to validate the issuance and sale of securities by stamping on old securities a provision for extension of the date of maturity, p. 402.

Security issues, § 38 — Extension of maturity — Application of statute — Consistency of Commission action.

5. The fact that the Securities and Exchange Commission did not treat extended securities as new issues for the purpose of continuing trading

privileges in no way involves the assumption that they should not be regarded as new sales or issues under the statutory provisions relating to the filing of a declaration under §§ 6 (a) and 7 (c) and (d) of the Holding Company Act, p. 403.

Statutes, § 13 — Construction — Holding Company Act — Interpretation of Commission.

6. Interpretation of the Public Utility Holding Company Act by the Securities and Exchange Commission should control unless plainly erroneous, p. 403.

[November 7, 1938.]

APPEAL *from order of District Court restraining defendants from directly or indirectly extending the maturity date of securities without complying with § 7 of the Public Utility Holding Company Act of 1935, and with the order under such section permitting such declaration to become effective as required by § 6(a) of such act; order affirmed. For decision of lower court, see 26 P.U.R.(N.S.) 275.*

APPEARANCES: Travis, Brownback & Paxton, of New York city (Charles M. Travis, Garrett A. Brownback, and Jesse J. Holland, all of New York city, of counsel), for defendants-appellants; Chester T. Lane, of Washington, D. C., General Counsel (Lewis M. Dabney, Jr., Milton V. Freeman, and David Ginsburg, all of Washington, D. C., of counsel), for Securities and Exchange Commission.

Before Manton, Augustus N. Hand, and Chase, Circuit Judges.

AUGUSTUS N. HAND, C. J.: The Securities and Exchange Commission brought the above suit against Associated Gas & Electric Company, hereafter called the "company," to restrain it and other defendants from extending the maturity date of certain of its bonds of an issue known as "5½ per cent convertible investment certificates" maturing on November 15, 1938. During the years 1928 and 1929 approximately $31,000,000 at par of the investment certificates were issued and sold or otherwise disposed of. As a result of various reacquisitions and exchanges for other securities, the amount of the certificates outstanding in the hands of the public (exclusive of $144,800 which had been extended under previous proposals) had by January 26, 1938, been reduced to about $3,200,000. In order to conserve cash and to avoid refinancing the securities of a public utility holding company in difficult and uncertain times, the company on January 26, 1938, submitted to the holders of the certificates a proposal to pay off 20 per cent of the principal coming due and to extend the maturity date of the balance either for one year or for five years from the date of maturity at the option of the holder. As an inducement to the holders to extend payment of their certificates for five years an additional interest advance of 2 per cent was offered. Enclosed with the extension offer was a form of letter of transmittal addressed to the company's agent, to be filled out and

signed by the holder agreeing to the particular extension elected, with authority to stamp such extension on his certificate. No change in the certificates was proposed other than the extension of the maturity date of the principal that was to remain unpaid, and the interest was to continue at the original rate of 5½ per cent per annum. The extension was to be effected by stamping (by a rubber stamp) a legend on such certificates as were payable to bearer and affixing coupons for the extended period. The form of the legend to be stamped on registered certificates when extended for one year was as follows:

"Twenty per cent of the principal amount of this certificate has heretofore been paid. The holder of this certificate, for value received has agreed to the extension of the maturity of the unpaid portion of the principal hereof to November 15, 1939, to which each successive holder hereof is bound by the acceptance hereof. This certificate shall continue to bear interest, payable quarterly, upon the unpaid portion of the principal hereof, at the rate of 5½ per cent per annum."

The legends stamped on certificates extended for five years, as well as on those in bearer form, were substantially the same.

[1–3] At the time of the extension proposed the company was not a registered holding company under the Holding Company Act, 15 USCA §§ 79–79z—6. It registered as such on March 29, 1938, but continued to make extensions without filing a declaration under § 7 of the Holding Company Act, 15 USCA § 79g, because counsel advised that in their opinion an extension of the maturity did not constitute an issue or sale of a security within the meaning of § 6(a) of that act, 15 USCA § 79f(a), which reads as follows: "Section 6 [§ 79f]. (a) Except in accordance with a declaration effective under § 7 [§ 79g] and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company."

The term "issue" is not defined in the act, but in § 2 (a) (23), 15 USCA § 79b (a) (23), the word "sell" is defined thus: " 'Sale' or 'sell' includes any sale, dispositon by lease, exchange or pledge, or other disposition."

Judge Clancy held in the court below that the securities evidenced by the stamped certificates delivered to the holders of the old certificates were "sold" within the meaning of § 6(a) of the Holding Company Act, 15 USCA § 79f(a), and made an order restraining the defendants pendente lite from "directly or indirectly extending the maturity date of any of the 5½ per cent convertible investment certificates of the Associated Gas and Electric Company to November 15, 1939, or to November 15, 1943, or to any other date by use of the mails or any means or instrumentality of interstate commerce, except in accordance with a declaration under § 7 of the Public Utility Holding Com-

pany Act of 1935 and with the order under such section permitting such declaration to become effective, as required by § 6(a) of such act." The defendants have appealed from his order. In our opinion it should be affirmed.

If it had been proposed that the old certificates should be surrendered and that new securities having later maturity dates should be issued in their place it is not questioned that § 6(a) (1), 15 USCA § 79f(a) (1), would apply and a declaration under § 7, 15 USCA § 79g, and an order of the Commission would be necessary to render the new certificates lawful. The effect of the proposal under consideration would be identical. Why a stamp on the old certificates extending their maturity when accepted by the owner would not amount to the issue or sale of a security is hard to see. He would thereby surrender his right to have the certificate paid in full on November 15, 1938, and in place of it would receive 20 per cent in cash and acquire the right to payment of the remaining 80 per cent a year or five years later, instead of upon the original date. There would be a legal consideration for the new obligation and the fact that the same piece of paper would contain the earlier and the later obligation seems quite immaterial. To treat the proposed arrangement as beyond the jurisdiction of the Securities and Exchange Commission would seem to place form above substance and to defeat the statutory purpose of safeguarding the public interest by affording the means of investigating the merits of such transactions by the Commission so that issues of securities may be stopped if found inexpedient for the security holders. There may be doubt about whether the security holder will be as well off if he extends the date of payment and leaves his claim at the risk of the business for one or five years more as he would be if he insisted upon its present liquidation. He is in effect making a further investment and if the general policy of the act is sound he is entitled to have the guidance of the Commission as to its desirability. It is true that some of the risks, such as the priority of certain liens to his claim, may have been settled when he made his original investment but the continuance of it necessarily involves new dangers.

[4] It is argued by the appellants that § 12(e) of the Holding Company Act, 15 USCA § 79*l* (e), gives sufficient supervision over arrangements to extend the maturity of securities without invoking the provisions of §§ 6(a) and 7. Section 12 (e) reads as follows: "(e) It shall be unlawful for any person to solicit or to permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder."

It is reasonably plain from the text of § 12(e) that it aims at regulating the solicitation of proxies. The

House Committee stated the object of § 12(e) thus: "Subsection (e) covers the solicitation of proxies in connection with all holding company and subsidiary company securities so that such solicitations will not afford the basis for subtle control adverse to the interests of investors who have a right to be kept fairly and properly informed by representatives of their own choosing." (H. R. Rep. No. 1318, 74th Cong., 1st Sess., p. 18.)

We do not think it is obvious that § 12(e) covers the substance of transactions affecting the extension of payment of securities. But if it should apply there would be no conflict between its provisions and those of § 6(a). If its provisions became applicable through regulations adopted by the Commission to control the solicitation of consents or proxies they would only afford means of protecting security holders in addition to those embraced in § 6(a).

[5] It is urged that the interpretation put by the Commission upon § 12(f) of the Securities Exchange Act of 1934, 15 USCA § 78*l*(f), as evidenced by Rule JF2 adopted thereunder is inconsistent with the interpretation which it has placed upon § 6(a) of the Public Utility Holding Company Act of 1935. Rule JF2 continues the unlisted trading privileges of the owners of securities though the maturity, interest rate, or amount of principal outstanding has been changed. But the fact that the Commission did not treat extended securities as new issues for the purpose of continuing trading privileges in no way involves the assumption that they should not be regarded as new sales or issues under § 6(a) and 7(c) and (d). Continuance of the owner's trading privileges under § 12(f) of the Securities Exchange Act, 15 USCA § 78*l*(f), affords no reason for depriving him of the protection afforded by § 6(a) in a case where need of protection is just as great as though the old security had been physically surrendered and a new one issued differing from the former only in maturity date.

In Blue Mountain Consol. Water Co. v. Public Service Commission (1937) 125 Pa. Super. Ct. 1, 17 P.U.R. (N.S.) 128, 189 Atl. 545, the Pennsylvania superior court held that the reduction of the interest rate of a security did not constitute the issuance of a new security but expressly distinguished the reduction of interest from the extension of the maturity date. Whatever might have been the opinion of that court about the effect of an extension we find no justification for disregarding the construction of § 6(a) which the Securities and Exchange Commission has adopted. Any interpretation of the meaning of the words "issue or sell" other than the one adopted would involve a tenuous distinction betwen a new certificate, identical with the old except as to its maturity date, and an old one in which the maturity is extended by an inscription written on the original document. Such a distinction is most unreal and serves to defeat the declared purposes of the act.

[6] The Interstate Commerce Commission has uniformly treated the extension of outstanding obligations as within § 20a of the Interstate Commerce Act, 49 USCA § 20a, and as involving an issue of securities which must have its approval. The long-set-

tled practice of that Commission in upholding its jurisdiction over securities, the maturity of which is extended, affords a persuasive analogy in support of the ruling of the Securities and Exchange Commission. Moreover, we are dealing with a new act the administration of which is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the act should control unless plainly erroneous. In no other way can the objects of the act be attained without constant and disconcerting friction. Norwegian Nitrogen Products Co. v. United States (1933) 288 U. S. 294, 315, 77 L. ed. 796, 53 S. Ct. 350. In view of the foregoing the decision of the court below seems to us to have been plainly correct.

Order affirmed.

MONTANA SUPREME COURT

State ex. rel. Public Service Commission et al.

v.

District Court of First Judicial District in and for Lewis and Clark County et al.

[No. 7858.]

(— Mont. —, 84 P. (2d) 335.)

Appeal and review, § 25 — Power to control Commission action — Prohibition.

1. The only question before the court in original proceeding on an alternative writ of supervisory control to annul and set aside a district court's writ of prohibition enjoining the Commission from assuming jurisdiction in a controversy between private citizens and a public utility as to the latter's right to store water from a river is purely judicial, since the relief sought has nothing to do with regulation of public utilities as contemplated by statutes which were enacted for benefit of consumers of utilities' products, p. 405.

Constitutional law, § 8.1 — Legislature — Powers — Commissions.

2. The legislature cannot exercise judicial powers through the Commission or otherwise, p. 405.

Water, § 8 — Powers of Commission — Adjudication of water rights.

3. The Commission has no power to adjudicate water rights in order to

determine whether an electric utility is entitled to store water from a river, p. 406.

(ANGSTMAN, J., dissents.)

[November 15, 1938.]

ORIGINAL proceeding on an alternative writ of supervisory control seeking to annul and set aside a writ of prohibition issued by District Court prohibiting Commission from assuming jurisdiction in controversy between private citizens and a public utility as to latter's right to store water from river; petition for a permanent writ of supervisory control denied and proceeding dismissed.

APPEARANCES: John W. Bonner and Wellington D. Rankin, both of Helena, for relators; W. H. Hoover and John E. Corette, Jr., both of Butte, for respondents.

GODDARD, C. J.: This is an original proceeding on an alternative writ of supervisory control wherein the relators seek to have annulled and set aside a writ of prohibition issued by the district court of Lewis and Clark county, which prohibited the Public Service Commission from assuming jurisdiction in a controversy between certain resident farmers in Gallatin county and the Montana Power Company, which owns and operates two dams on the Madison river for the purpose of generating electricity for public use.

In the complaint filed with the Commission, the farmers alleged that they owned lands irrigable from the waters of the Madison river; that the Montana Power Company unreasonably and unlawfully stored water during the irrigation seasons, thereby depriving the farmers of the natural flow of the river, and that this was done although some of the farmers were prior water-right holders to the Montana Power Company; but it is not alleged that the water rights have been adjudicated by decree of a court.

[1] Counsel for the respective parties made able arguments to the court and submitted extensive briefs in the case, but there can be but one question for our determination, and that is as to the jurisdiction of the matter, which is purely and simply judicial.

The relief sought has nothing to do with the regulation of public utilities as contemplated by the statutes. The statutes were enacted for the benefit of the consumers of the utilities' products, and not to arbitrate controversies between the utilities and private persons.

[2] That the legislature, acting through the Public Service Commission or otherwise, cannot exercise judicial powers is definitely set out in § 1, Art. 4, of the Constitution of Montana, wherein it is said: "The powers of the government of this state are divided into three distinct departments: The legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to ei-

ther of the others, except as in this Constitution expressly directed or permitted."

The legislature has unequivocally precluded the Commission from exercising any judicial powers in § 3882, Rev. Codes: "In addition to the modes of procedure hereinafter prescribed in particular cases and classes of cases, said Commission shall have power to prescribe rules of procedure, and to do all things necessary and convenient in the exercise of the powers by this act conferred upon the Commission; provided, that nothing in this act shall be construed as vesting judicial powers on said Commission, or as denying to any person, firm, association, corporation, municipality, county, town, or village the right to test, in a court of competent jurisdiction, the legality or reasonableness of any fixed order made by the Commission in the exercise of its duties or powers."

[3] The Commission in this case would have to adjudicate water rights in order to determine whether the Montana Power Company was entitled to store the water, and this is an exercise of a power the Commission could not and does not have. The remedy of the farmers is clearly a matter for the courts,—the proper place to adjudicate water priorities and to enjoin the unlawful or unreasonable use of such waters.

There being no merit in the other contentions of relators, the petition for a permanent writ of supervisory control is denied and the proceeding is dismissed.

Anderson and Morris, JJ., concur.

Stewart, J., deeming himself disqualified, takes no part in the above decision.

ANGSTMAN, J. (dissenting): In January, 1938, a complaint was filed with the Public Service Commission by twenty-six farmers, in which they alleged that they are the owners of irrigable lands in the Madison river valley; that the Montana Power Company, engaged in producing, delivering, and furnishing electricity to its consumers for profit, in the year 1937 and for several years prior thereto, without the consent of the complainants impounded and stored the waters of the natural flow of the Madison river by means of dams during the irrigating season and deprived complainants of waters to which they were entitled for irrigating purposes, and thus damaged their crops by lack of water; that the dams were known as the Hebgen dam and the Madison river dam; that at the Madison river dam a hydroelectric generating plant is maintained. The complaint alleged that the power company maintains hydroelectric generating plants along the Missouri river, which is formed at Three Forks by the Gallatin, Madison, and Jefferson rivers; that the only facilities for storing water are on the Madison river, and that the two dams there maintained are used to store water for release for generating purposes at plants along the Missouri river in periods of low water in the Missouri caused by a decrease in the flow of the Gallatin and Jefferson rivers; that the water rights of many of the complainants to the waters of Madison river were acquired long prior to the rights of the Montana Power Company; and that upon information and

belief the utility company, in doing the acts complained of, proceeds upon the assumption that it is of greater importance that the waters of Madison river be stored for use in generating electric energy during periods of low water in the Missouri river than that complainants have water when needed for irrigating their crops. The complaint sets forth that the acts complained of constitute unreasonable and unjust practices and acts affecting and relating to the production and furnishing of light and power. The complaint requested a hearing, after which the utility company be ordered to desist from storing the waters of the natural flow of the Madison river during the irrigation season of 1938, and in future years, so as to deprive complainants of the waters to which they are entitled.

The Commission noticed the matter for hearing on February 8, 1938, by an order to show cause. Sometime before February 8th the utility company filed a motion to quash the order to show cause, challenging the jurisdiction of the Commission to hear the matters complained of, and requested that the motion be set for February 2nd and prior to the date of the hearing ordered on the complaint. The Commission denied this request and set the motion for hearing on February 8th, at the same time and place as had been fixed for the hearing on the complaint.

The utility company on February 4th made application to the respondent court for a writ of prohibition to restrain the Commission from taking any further proceedings under the complaint for want of jurisdiction in the Commission to hear the matters complained of. The court restrained the Commission from proceeding further in the matter until final determination of the question by the court. After hearing, the court granted a peremptory writ of prohibition, restraining the Commission from proceeding further in the matter, and directing the Commission to dismiss the complaint before it and to make return to the court that it had done so. The Commission applied to this court for a writ of supervisory control to annul the writ issued by the respondent court.

The single question involved going to the merits of the controversy is: Did the Commission have jurisdiction to hear the matters complained of in the complaint?

In considering this question I keep in mind the well-settled rule that the Commission is an administrative agency possessing only such powers as the legislature has seen fit to give it, and that reasonable doubts as to the grant of a particular power will be resolved against the existence of the power. State ex rel. Thacher v. Boyle (1921) 62 Mont. 97, 204 Pac. 378; Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, P.U.R. 1930E, 134, 293 Pac. 294.

The right of regulation has its source in the police power of the state, which the legislature may exercise directly or may delegate the power to an administrative agency, such as the Public Service Commission. Billings v. Public Service Commission, 67 Mont. 29, P.U.R.1923E, 77, 214 Pac. 608; Public Service Commission v. Helena, 52 Mont. 527, P.U.R.1916F, 389, 159 Pac. 24; State ex rel. Billings

v. Billings Gas Co. 55 Mont. 102, P.U.R.1918F, 768, 173 Pac. 799.

The state may exert its police power in the regulation of a public utility whenever the public interests require, and a large discretion is vested in the legislature to determine not only what the public interests require, but what measures are necessary for the protection of such interests. Chicago v. O'Connell, 278 Ill. 591, P.U.R.1917E, 730, 116 N. E. 210, 8 A.L.R. 916. And the power may be exerted to override contracts, privileges, franchises, charters, or city ordinances. State ex rel. Kirkwood v. Public Service Commission, 330 Mo. 507, P.U.R.1932E, 253, 50 S. W. (2d) 114; Milwaukee Electric R. & Light Co. v. Wisconsin R. Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 S. Ct. 820.

Keeping in mind these principles, has the Commission the statutory power to consider the matters complained of? It is my view that it has under the express provision of § 3897, Rev. Codes, the pertinent parts of which are as follows: "Upon a complaint made against any public utility . . . by any person or persons . . . , provided such persons . . . are directly affected thereby that any . . . practices, or act whatsoever affecting or relating to the production, transmission, or delivery, or furnishing of heat, light, water, or power, . . . is in any respect unreasonable, . . . the Commission shall proceed, with or without notice, to make such investigation as it may deem necessary. But no order affecting such . . . practice or act complained of, shall be entered without a formal hearing."

Section 3899, after providing for the fixing of just and reasonable rates after hearing, also provides: "If it shall in like manner be found that any . . . practice, act, or service complained of is unjust, unreasonable, . . . or otherwise in violation of the provisions of this act, . . . the Commission shall have power to substitute therefor such other . . . practices, service, or acts, and make such order relating thereto, as may be just and reasonable."

My associates hold that in order for the Commission to hear the matters complained of, it will be necessary for it to exercise judicial functions which the statute, § 3882, prohibits it from doing. Specifically they hold that in order for the Commission to pass upon the matters complained of it must make an adjudication of water rights, which it is contended is a judicial question. The answer to this contention is twofold. In the first place, by filing the motion to quash before the Commission, the utility company, for the purpose of that motion, admits the allegations of facts set forth in the complaint, one of which is that at least some of the complainants have the prior right to the use of the waters of Madison river. In considering the question of the jurisdiction of the Commission raised by the motion to quash, the facts pleaded in the complaint must be taken as confessed for the purpose of the motion.

In the second place, if the utility company by answer raised an issue on the question of priority, its solution by the Commission for the purpose of determining what action it would take on the complaint would not amount to the exercise of judicial powers. Where the Commission is authorized to act

upon the existence of a certain state of facts, it has jurisdiction to determine the existence or nonexistence of those facts.

Spurr in Vol. 1, p. 171, of his treatise on the Guiding Principles of Public Service Regulation, has this to say: "It must not be understood, however, from the illustration of the limitations upon Commission jurisdiction which have been given, that these bodies are entirely powerless to inquire into questions of a judicial or quasi judicial nature. If they were absolutely without authority to do so, very little business would be done. Commissions, as has been stated, will not determine the validity of statutes conferring jurisdiction upon them. That is in strict conformity with the command to keep off the domain of the courts. They may, however, and often do, interpret statutes—strictly a judicial function—so far as necessary to determine whether they have jurisdiction over the subject matter of the controversy. Commissions possess the power, in fact, to decide and declare the law present or antecedent, whenever necessary to the determination of any matter upon which their jurisdiction rests. If this were not so, Commissions might spend much of their time uselessly. It must be remembered in this connection that if the Commission err in the determination of these questions, the interests of the parties are protected by the right of appeal to the courts. . . . Wherever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or nonexistence of the requisite facts. Its jurisdiction cannot be affected by the circumstance that these facts are denied."

The supreme court of California, in discussing this question where asserted water rights were claimed, in the case of Limoneira Co. v. Railroad Commission, 174 Cal. 232, P.U.R. 1917D, 183, 193, 162 Pac. 1033, 1037, said: "A large part of the briefs of learned counsel for petitioner is devoted to discussion of a claim that the Railroad Commission was without jurisdiction to determine any question as to the validity of petitioner's asserted rights of property in regard to the waters claimed by them in good faith. In view of the provisions of our Constitution and the Public Utilities Act, and our decisions thereunder, we do not see how it can be doubted that the Railroad Commission had the power to determine for the purposes of the exercise of its jurisdiction to regulate a public utility by the fixing of rates, subject to such power of review as is possessed by this court, all questions of fact essential to the proper exercise of that jurisdiction." The court also in the case just cited referred to its prior case of Palermo Land & Water Co. v. Railroad Commission (1916) 173 Cal. 380, P.U.R.1917A, 447, 452, 160 Pac. 228, and from it quoted with approval the following: "Wherever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or nonexistence of the requisite facts, . . . its jurisdiction cannot be affected by the circumstance that these facts are denied."

Generally speaking, it is the function of the courts to construe the Constitution and laws; yet an administra-

tive officer or board in passing upon the extent of his or its jurisdiction must do so in the first instance, and in doing so is not exercising judicial functions.

The Commission of the state of Missouri, in United Commercial Travelers v. Marshall Bros. Livery Co. P.U.R.1918E, 391, 394, I think announced the correct rule when it said: "From force of circumstances and conditions necessarily arising in the administration of the affairs of the government, both state and national, it is evident that those who are charged with official duties, whether executive, legislative, or judicial, must necessarily construe the Constitution and laws in numerous instances. Every department of the government vested with statutory or constitutional powers must, in the first instance, at least, be the judge of its powers, or it could not act. This necessary construction by the departments and branches of government, other than the judiciary, is commonly termed 'practical construction,' as distinguished from 'judicial construction.' From the very nature of the American system of government, with Constitutions prescribing the jurisdiction and powers of each of the three branches of government, it has devolved upon the judiciary to determine whether the acts of the other two are in harmony with the fundamental law. All the departments of government are, however, unquestionably entitled and compelled to judge of the Constitution and statutes for themselves; but in doing so, they act under the obligations imposed in the instrument, and in the order of time pointed out by it. The judiciary speaks last upon the subject. These are principles universally recognized by the judiciary in defining and regulating the relations between the several branches of government." To the same effect are Re Northwestern Indiana Teleph. Co. 201 Ind. 667, P.U.R.1930D, 143, 171 N. E. 65, and Natatorium Co. v. Erb (1921) 34 Idaho, 209, P.U.R.1922A, 187, 200 Pac. 348.

Should issue be raised on the question of priority in the water rights of Madison river, the Commission's finding on that issue would not be a judicial determination of the question. Section 3882, Rev. Codes, specifically guards against that conclusion and specifically saves the right of either party to the controversy to have a judicial review of the question. That is the utmost contemplated by § 3882. It was not intended by that section to restrict the Commission in making findings of fact upon which to base an order, but its sole purpose was to declare that those findings should not be given the effect of judicial findings. Concededly whatever order is made by the Commission is subject to judicial review.

At one time the Montana legislature went so far as to declare that when the Commission, after investigation and hearing, made an order it would be presumed reasonable, just and valid and, hence, should remain in force during the pendency of proceedings in court questioning its validity. Section 3906, Rev. Codes 1935. This statute the United States Supreme Court held dealt unfairly with the utility company; that it "definitely" denied to the utility company a plain, speedy, and efficient remedy in the

courts of the state. Mountain States Power Co. v. Montana Pub. Service Commission (1936) 299 U. S. 167, 81 L. ed. 99, 16 P.U.R.(N.S.) 235, 57 S. Ct. 168. As a result of the coercive force of that decision, Chap. 56, Laws of 1937, was passed amending § 3006, the effect of which is that whatever order the Commission may make, after full hearing and investigation, such order, to meet the essentials prescribed by the United States Supreme Court as fair treatment of the utility company, will be presumed to be unreasonable, unjust, confiscatory, and invalid to the extent that its enforcement may be enjoined until it has run the gauntlet of judicial scrutiny.

My associates declare that the statutes do not empower the Commission to interfere with the acts or practices of the utility company where, as here, the acts or practices complained of affect those not patrons of the utility company; and that the clause "affecting or relating to the production, transmission or delivery or furnishing of heat, light, water, or power, or any service in connection therewith," must be construed as having application to those only who use the service or product of the company. The wording of the statute, in my opinion, does not bear out this holding. Its provisions may be availed of by any person "directly affected" by the practices or acts. Complainants here are directly affected by the storing of the waters of Madison river. The acts and practices of storing the waters affect and relate to the production, delivery, and furnishing of light and power within the terms of the statute. That the authority of the Commission extends further than the fixing of rates, we have already held. In Great Northern Utilities Co. v. Public Service Commission, 88 Mont. 180, P.U.R. 1930E, 134, 139, 293 Pac. 294, 298, this court said: "Legislation affecting public utilities, in its earlier stages, had as its chief purpose the prevention of exorbitant charges being made for the product furnished. As the field covered by these utilities broadened, it became apparent that the public interest extended further than merely fixing of charges; that there was embraced as well the character of the service to be rendered, the kind of equipment employed; and that these things, and others, are so interdependent that one may not be intelligently regulated without control being exercised over the others."

In Postal Teleg.-Cable Co. v. Railroad Commission (1925) 197 Cal. 426, P.U.R.1926B, 22, 33, 241 Pac. 81, 86, the question presented was the authority of the Commission to order a horizontal separation of power and telephone lines. The supreme court of California, in speaking on the question, said: "We entertain no doubt but that the authority of the Commission extends to a correction of just such dangers as were shown to exist in the instant case. No one would dispute the right of the Commission to require a separation of two railroad tracks built so closely together as to endanger the safety of passengers and the general public or its power to order a wider separation of two high-power electric lines so close in parallel as to be an admitted menace to life and limb. The difference between the instanced cases and the instant case is in degree only." There is here no contention

that the power company is not a public utility; in other words, its business is affected with a public interest, and, therefore, is subject to regulation. Munn v. Illinois (1877) 94 U. S. 113, 24 L. ed. 77.

Whether the state, through the Public Service Commission, may regulate a public utility to the extent of protecting solely a private right need not here be determined. In this state the use of all water for beneficial use is a public use. Constitution, Art. 3, § 15. Interference with the beneficial use of waters is an interference with a public use. It has come to be recognized that the availability of waters in this state for agricultural purposes spells victory or defeat in agricultural pursuits. It is well known, too, that the failure of farmers to produce a crop creates distress among other lines of business, adds to the relief rolls and generally affects the public interest.

If, after investigation and hearing, the Commission finds that the power company is so using its property as unnecessarily to injure complainants, or is in effect depriving claimants of rights of property superior to those of the utility company, I see no reason why the Commission has not the jurisdiction, under § 3897, Rev. Codes, to order the discontinuance of such acts and practices.

It is well established that Public Service Commissions may be given authority to control and supervise security issues by public utility companies. The reason for this is the protection of both the investor and the ratepayer by preventing the impairment of credit by overcapitalization and rendering the company incapable of furnishing adequate service. 1 Guiding Principles of Public Service Regulation, by H. C. Spurr, pp. 54–58; Re Derry Electric Co. (1935) — N. H. —, 180 Atl. 697; Id. (1936) 88 N. H. 46, 16 P.U.R. (N.S.) 331, 184 Atl. 356. So here, if the allegations of the complaint are true, the utility company may be rendering itself liable to a number of damage actions which may ultimately result in interfering with necessary maintenance and depreciation reserves or otherwise impair the credit of the company, and thus actually affect ratepayers.

The utility company suggests that the maximum right of the Public Service Commission is to disallow any such expenses as items of operating expenses in determining the reasonableness of rates. With this I do not agree. In Ohio Central Teleph. Corp. v. Public Utilities Commission (1934) 127 Ohio St. 556, 2 P.U.R.(N.S.) 465, 469, 189 N. E. 650, 653, the question was presented whether the Commission could prevent the payment of dividends, unwarranted fees and service charges to holding companies, their officers and employees. The court held that the Commission had that right, saying: "The payment of dividends and charges from moneys that should be put into the depreciation fund for proper purposes is in effect payment out of capital. Public Utilities Commission v. Michigan State Teleph. Co. (1924) 228 Mich. 658, P.U.R.1925C, 158, 200 N. W. 749; Monroe Gas Light & Fuel Co. v. Michigan Pub. Utilities Commission, 292 Fed. 139, P.U.R.1923E, 661. Deterioration of the property for want of the replacements and renewals such

funds should provide works a diminution of the capital of the company. Such payments, if persisted in, must ultimately result in the impairment of the public service to which the property is dedicated." While the Ohio statutes are not the same as those of Montana, I think ours are sufficiently broad to warrant the Commission in preventing a utility company from engaging in practices and acts which may subject the company to damage actions to the ultimate injury of its patrons.

Nothing that I have said herein is to be construed as indicating that I am of the view that the utility company is subjecting itself to liability. That question is not before us. It is my view that the Commission has jurisdiction to hear the complaint and to enter such order as to it seems reasonable.

WISCONSIN PUBLIC SERVICE COMMISSION

Re Fennimore Telephone Company

[2-U-1324.]

Rates, § 575 — Telephones — Free interexchange service.

Free interexchange service between telephone exchanges should be eliminated as unlawful and discriminatory when there is almost a negligible use of the free service and where discontinuance of the free service will result in only a slight increase in additional revenue, since free interexchange service is justified only where a substantial community of interest is found to exist and where such service is warranted for the rates in effect.

[December 8, 1938.]

APPLICATION *for authority to eliminate certain free interexchange telephone service; application granted and rates established.*

APPEARANCES: Leo Rubendall, Fennimore, for the applicant; Kenneth J. Jackson, Senior Case Investigator, of the Commission Staff.

By the COMMISSION: The applicant proposes to discontinue free interexchange service between Fennimore and the following exchanges:

Bagley	Dickeyville	Petersburg
Barnum	Gays Mills	Potosi
Beetown	Glen Haven	Millville
Belmont	Highland	Rewey
Bloomington	Linden	Soldiers Grove
Cassville	Mount Hope	Steuben
Cobb	Mount Zion	Wauzeka
Cuba City	Patch Grove	Woodman

It proposes to continue to render free interexchange service from Fennimore to Stitzer, Mount Ida, and Werley.

OPINION

The exhibits and files indicate almost a negligible use of the free service. During a 3-day study period no calls were placed from Fennimore to fourteen of the exchanges. To exchanges where calls were placed the largest number was to Mount Hope where forty-seven calls were placed by thirty subscribers, or 4.2 per cent of the total exchange subscribers. Exhibit 3, which is an estimate of the increase in toll revenue based on the 3-day study if the free interexchange service is discontinued, indicates that there will be only a slight increase in additional revenue and will have little effect on the net operating income of the company.

We have generally considered free interexchange service as being justified only where a substantial community of interest is found to exist and where such service is warranted for the rates in effect.

The company has a low level of exchange rates varying from $2 per month net on business service to $1.15 net per month for multiparty residence and rural service.

Findings of Fact

The Commission finds: (1) That the present practice of the Fennimore Telephone Company of rendering free interexchange service from Fennimore to Bagley, Barnum, Beetown, Belmont, Bloomington, Cassville, Cobb, Cuba City, Dickeyville, Gays Mills, Glen Haven, Highland, Linden, Mount Hope, Millville, Mount Zion, Patch Grove, Petersburg, Potosi, Rewey, Soldiers Grove, Steuben, Wauzeka, and Woodman is unlawful and discriminatory.

(2) That the establishment by the Fennimore Telephone Company of the standard toll rates, as set forth in the appendix hereto from Fennimore to the exchanges set forth in the finding No. 1 above, is reasonable and lawful.

Re Annaton-Preston Telephone Company

[2-U-1321.]

Rates, § 582 — Telephones — Effect of routing.

Calls from and to the same exchange should not be charged a different rate merely because a different route is used.

[December 20, 1938.]

APPLICATION *for authority to discontinue certain special toll rate arrangements and free interexchange service; granted.*

APPEARANCES: Earl Murray, President, Montfort, for the Annaton-Preston Telephone Company; K. J. Jackson, Senior Case Investigator, of the Commission Staff.

By the COMMISSION: The applicant operates exchanges at Montfort and Stitzer and proposes to discontinue special toll rate arrangement and substitute therefor standard toll rates between Montfort and the following exchanges:

Bagley	Lancaster	Patch Grove
Beetown	Millville	Potosi
Bloomington	Mt. Hope	Werley
Cassville	Mt. Ida	Woodman
Glen Haven		

The applicant also proposes to discontinue free interexchange service between Stitzer and the following exchanges:

Bagley	Highland	Patch Grove
Beetown	Linden	Potosi
Bloomington	Millville	Rewey
Cassville	Mt. Hope	Werley
Cobb	Mt. Ida	Woodman
Glen Haven		

The application shows that free interexchange service is to be continued between Montfort, on the one hand, and Highland, Cobb, Livingston, Stitzer, Linden, and Rewey, on the other and between Stitzer on the one hand and Livingston, Fennimore, and Montfort, on the other.

In connection with the discontinuance of special toll rate arrangements at the Montfort exchange, a traffic study shows that between Montfort and Lancaster only 2.4 per cent of the total exchange subscribers placed calls and between Montfort and Mt. Hope only .3 per cent placed calls. No calls were placed between Montfort and eleven of the additional exchanges where it is proposed to substitute standard toll rates for such special toll rate arrangements.

Only 1 per cent of the total exchange subscribers placed calls between Stitzer, on the one hand, and Bagley, Mt. Hope, and Patch Grove, on the other, and no calls were placed between Stitzer and thirteen of the additional exchanges where it is proposed to discontinue free interexchange service.

The applicant proposes to continue its special toll rate arrangement in charging 20 cents per call between Montfort and Boscobel. In our opinion this should be reduced to 15 cents which is the standard station-to-station toll rate applicable to the distance between these points.

The applicant proposes to continue a special toll rate arrangement whereby a charge of 20 cents is made on calls from Stitzer to Platteville via Lancaster and 15 cents on calls via Livingston. There appears to be no valid reason why a call from and to the same exchange should be charged a different rate merely because a different route is used. The standard station-to-station rate between Stitzer and Platteville is 15 cents and this rate should be applicable irrespective of the routing.

Exhibit No. 2 which is the operating statement of this company shows that even with the additional revenue which will result through the proposal herein, it will still be operating at a loss.

Findings of Fact

The Commission finds:

1. That the continuance of the nonstandard toll rate by Annaton-Preston Telephone Company of 20 cents per call from Montfort to Boscobel is unreasonable and unlawful;

2. That the establishment by said company of a 15-cent toll rate from Montfort to Boscobel is reasonable and lawful;

3. That the continuance by said company of its special toll rate arrangements between Montfort, on the one hand, and Bagley, Beetown, Bloomington, Cassville, Glen Haven, Lancaster, Millville, Mt. Hope, Mt. Ida, Patch Grove, Potosi, Werley, and Woodman, on the other, is unreasonable and unlawful;

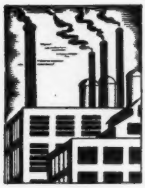
4. That the establishment by said company of standard toll rates as set forth in the appendix hereto [appendix omitted] between the points set forth in finding No. 3 above is reasonable and lawful;

5. That the continuance of free interexchange service by said company between Stitzer, on the one hand, and Bagley, Beetown, Bloomington, Cassville, Cobb, Glen Haven, Highland, Linden, Millville, Mt. Hope, Mt. Ida, Patch Grove, Potosi, Rewey, Werley, and Woodman is unlawful and discriminatory;

6. That the establishment of standard toll rates by said company as set forth in the appendix hereto between the exchanges set forth in finding No. 5 above is reasonable and lawful;

7. That the continuance by said company of a toll rate of 20 cents on calls from Stitzer to Platteville via Lancaster is unreasonable and unlawful;

8. That the establishment by said company of a toll rate of 15 cents per call from Stitzer to Platteville via Lancaster is reasonable and lawful.



Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.

Pennsylvania Power & Light Increases Construction Budget

CONSTRUCTION expenditures of the Pennsylvania Power & Light Co. for this year will total approximately $3,000,000, as against about $2,400,000 during 1938, according to L. W. Heath, vice-president.

Mr. Heath pointed out that there will be no spectacular expenditures during the year and no major increase in installed generating capacity is being contemplated. However, there will be some increase in substation capacity, probably in the neighborhood of 7,400 kva at a cost exceeding $100,000.

During 1938 the company added about 400 miles of rural lines and ended the year with a total of approximately 7,150 miles of rural lines. During the year the company added 5,641 new rural customers, including farm, to bring the total of all rural customers to approximately 81,600.

The extent of rural electrification carried on by the company is shown by the fact that during the past twelve years the number of miles of line and service has increased 650 per cent; number of rural customers increased 400 per cent, and the number of farm customers served has increased 800 per cent. It is probable, Mr. Heath said, that rural line extension this year will not be less than 300 miles, and that 3,000 to 4,000 new customers will be added to new and existing lines.

District representatives in rural areas assisted in the sale of about 5,000 electric farm devices sold by dealers during last year.

Major appliance sales by the utility and dealers during 1938 included 3,900 electric ranges, 2,600 gas ranges, 750 electric water heaters, 500 automatic gas water heaters, 17,200 automatic refrigerators in addition to 149,000 miscellaneous small appliances.

Exide-Chlorides Installed at Boulder Dam

To carry the 240 k.w. at 287.5 k.v. from Boulder Dam to Los Angeles, new switchgear had to be designed as well as new transformers, new cable connectors, suspension clamps and other appurtenances, including a new type of hollow conductor, used for the first time in this country.

Exide-Chloride batteries were chosen for all oil-switch operation and supervisory control circuits at the Bureau's several switching and receiving stations. In addition, an Exide is used for telephone service at the Silver Lake switching station. Exide-Chlorides are used at the Boulder Dam power house for control bus and emergency lighting service.

Bulletin 204, describing construction and performance of Exide batteries may be secured from The Electric Storage Battery Co., Philadelphia, Pa.

Davey Tree Uses New Power-driven Saw

A SPECIAL, newly developed air-driven crosscut saw that cuts down large trees with amazing speed is now being used by The Davey Tree Expert Company, in clearing out dangerous or undesirable trees that stand too near to power, light or telephone wires. On cross-country work along the right of ways where there are a considerable number of trees to come down, the use of the power-driven saw has reduced costs from twenty to forty per cent.

A truck-mounted air compressor carrying as much hose as necessary supplies the air to operate the saw. The saw, itself, which will handle trees up to four feet in diameter, is used first to make the notches and is then quickly clamped to the trunks for the final cut. Trees are roped in the usual way to guide them as they fall.

A small crew of men using this power equipment replaces several crews of sawyers. Economies have been quite striking but greatest where the trees to be removed are not too widely scattered, according to Davey Tree Expert Co.

Thermostat Companies Sales Organizations Consolidated

CONSOLIDATION of the sales organization of Robertshaw Thermostat Company, Youngwood, Pa., and its affiliate, the American Thermometer Co., St. Louis, Mo., has been announced by John A. Robertshaw, vice-president and general manager. Mr. Robertshaw also announced the election of H. T. Ryan as a vice-president. Mr. Ryan, formerly Robertshaw sales manager, will assume managerial duties relating to the activities of the two companies and another affiliate, Grayson Heat Control, Ltd., Lynwood, Calif.

The merger of the sales organizations resulted in the establishment of a number of new positions. T. T. Arden, formerly sales manager of American Thermometer Company, has been named sales manager in charge of domestic appliance control sales. Glenn Bowman has been appointed manager of the East

Central division; J. E. O'Hagan, manager of the Central division; Frank Post, manager of the Eastern division; and M. S. Unger, manager of the home office division and export manager.

Sales of all three companies west of the Rocky Mountains will be handled by Grayson Heat Control, Ltd.

A new sales division for the three companies to market commercial and industrial controls has been created under the direction of Walter D. Crouch, sales manager. Mr. Crouch formerly served as manager of the Eastern division for the Robertshaw Thermostat Company for a number of years; also as sales manager of the Industrial division.

Mr. Robertshaw stated that the object of the new sales operation was to increase the effectiveness and the facilities of a sales-engineering service and to improve the existing service rendered all gas appliance manufacturers through the three factories. Geographical locations of these factories are such, Mr. Robertshaw stated, that excellent service can be rendered all accounts in the United States and Canada and the new sales operation is expected to enhance the value of the plant locations.

New G-E Commercial Vice-Presidents

R. M. Alvord, J. E. N. Hume and A. S. Moody have been appointed commercial vice-presidents of the General Electric Company, at a meeting of the board of directors, according to an announcement by Gerard Swope.

Mr. Alvord is manager of General Electric's Pacific district, consisting of California, Arizona and Western Nevada.

Mr. Hume has been manager of the Industrial Department of the General Electric Company since December, 1935.

Mr. Moody has been manager of the Northwest district of the company since 1936, prior to which he was manager of the Northwestern territory.

Duke Power Co. Starts Work on New Steam Power Plant

CONSTRUCTION of the Duke Power Co. new steam-generating plant at Cliffside is under way and is scheduled for completion and operation June 1, 1940, according to Charles I. Burkholder, vice-president and chief engineer.

Mr. Burkholder stated that the new plant will consist of two 50,000-kva., 3,600-r.p.m., hydrogen-cooled, 900-lb., 900-deg. F. turbines, together with one boiler, with complement of burning and pulverizing equipment for each unit. Turbines, boilers and most auxiliary equipment have already been purchased and actual work is under way.

Chevrolet Sales Continue to Advance

CONTINUING the advance that has been apparent ever since introduction of its new 1939 models, Chevrolet sold 51,966 new cars and trucks at retail in January, W. E. Holler, general sales manager, announced recently. This compares with 39,469 units in January, 1938, and is an increase of 12,566 units or 31.7 per cent.

In the same month, Mr. Holler announced, Chevrolet dealers sold 114,375 used cars, or 8,925 more than in January, 1938. Combined new and used car sales for the month were 166,341 units, as compared with 144,919 a year ago.

For the past three months, Mr. Holler pointed out, there has been a steady rise in the monthly percentage of increase over sales for corresponding periods in the 1938 model year. In November, the advance was slightly more than 6 per cent; in December it was 25.4 per cent, and in January, 31.7 per cent.

Generally improved business conditions, plus the public's enthusiasm over the 1939 Chevrolet, featuring new type knee action and the exclusive vacuum gearshift with steering column control, is credited with the sharp upturn, Mr. Holler said.

Switches Withstand Arctic Tests

DUPLICATING winter at its worst in a research laboratory room, General Electric engineers have proved that a coating of solid ice one and a half inches in thickness will not prevent operation of their outdoor high-voltage air-break switches.

Both vertical-break, tilting-insulator type, and horizontal-break, rotating-insulator type switches were subjected to the tests. In closed position, they were placed in the test room, where the temperature was maintained at from 10 to 20 degrees Fahrenheit below zero. The switches were given a water-spray bath and even those parts normally protected from the weather were coated with a heavy layer of ice.

Both type switches were opened easily with a regular manual lever. The saw and lever action of the blade cracked the ice in the

contacts and the powerful leverage of the mechanism parts shattered their ice coatings.

Similar tests were conducted with the switches frozen in the open position. It was found that the hammer-blow action of the loosely hinged blade-end required but a few strokes to chop away the ice formed in the stationary contact housing, and the switches were easily closed.

The results of the tests were attributed to the design of the mechanized portions of the switches. Large square shafts are provided for inter-pole operation of the tilting type switches. The rocker bearings have bronze bushings; all rotating bearings are ball bearings; and the motor windings of the switches are impregnated to resist moisture. All the gears are fully enclosed.

Maryland Utilities Association to Meet in Baltimore

THE annual meeting of the Maryland Utilities Association will be held at the Lord Baltimore Hotel, Baltimore, Maryland, on April 14, 1939.

Three meetings will be held in the morning, one each for the electric, gas and transportation groups. Officials from utility organizations will speak at each of these meetings. A combined meeting of the three groups will be held in the afternoon.

A. G. A. E. M. Starts National Sales Promotion Campaign

To effectively dramatize the benefits of automatic gas water heating, the Association of Gas Appliance and Equipment Manufacturers launched in January a nation-wide sales promotion campaign to extend throughout the year, it was announced by H. N. Ramsey, chairman of the Association's sales promotion committee. Enlisting the support of gas company executives and employees, dealers, builders and architects, the promotional project will be aimed at creating greater public demand for gas water heating through more adequate sales presentations and more informed public contacts.

Gas companies are urged to undertake greater local advertising and other promotion. Suggested newspaper advertisements, bill enclosures, mailing pieces, window displays, show room banners, car-cards and large posters are included in the sales promotional material made available to the local companies. The elements of health, beauty and convenience will be featured in the campaign which will stress gas water heating as the "24-hour servant" that furnishes hot water to the average home 150 times a day.

As a key part of their 1930 program, the A. G. A. E. M. will conduct two prize essay contests, one for gas company executives and employees and the other for retail dealers. Prizes for the two competitions will be duplicated. The first prize will be $500; the second $250; the third $150, and the fourth prize $100. The essay contests will close April 1st and the awards will be announced May 1st.

The subject for the gas company contest will be "The Value of the Water Heating Load and How it May Be Secured." The dealers will write on "What the Promotion of Automatic Gas Water Heaters has Done for My Business." There are no limitations as to the number of words a contestant may use.

Electrical Trade Expects 25 Per Cent Gain

THE electrical manufacturing industry estimates that its improvement over 1938 may reach as much as 25 per cent, according to Carl L. Pierce, Jr., president of the National Electrical Manufacturers' Assn.

Mr. Pierce believes that many factors point to better business for the industry in 1939. Residential building is increasing, the desire for living electrically is more widespread, the demand for electric service is growing and utility modernization and expansion is continuing, although still restricted. The research laboratories have been especially active and each day sees some new development bringing increased benefits from the use of electricity and constantly lowering its cost, thus ever widening its circles of uses and users. New generating and transmission facilities will be added by the new defense program and replacement sales of appliances have been increasing.

Revised Electric Lines Safety Handbook Issued

CHANGES in Part 4 of the National Electrical Safety Code, now being revised under ASA procedure, have been incorporated in a new booklet issued by the National Bureau of Standards as Handbook H34. The section just published is entitled "Safety Rules for the Operation of Electric Equipment and Lines." It contains rules for both employers and employees who have the handling of overhead and underground supply and communication lines and the power stations from which the supply lines receive their energy.

There are six sections in this part of the Code. Three deal with supply systems, two with communication systems, and one is of a general nature. Rules to be followed by employers and those to be followed by employees are segregated so as to bring out the separate responsibilities of each.

The National Electrical Safety Code is now being revised by a sectional committee of the American Standards Association, and Part 4 which has been completed has been submitted to the ASA for approval. Copies of Handbook H34 are available from the Superintendent of Documents, Government Printing Office, Washington, D. C., at 10 cents each.

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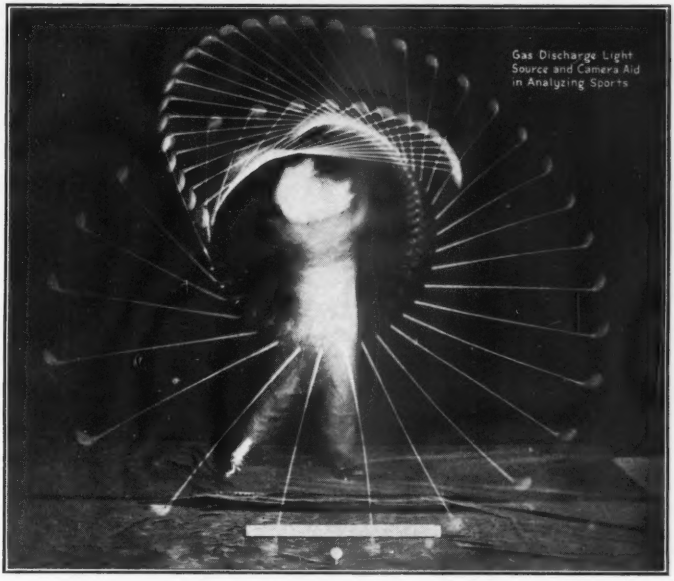

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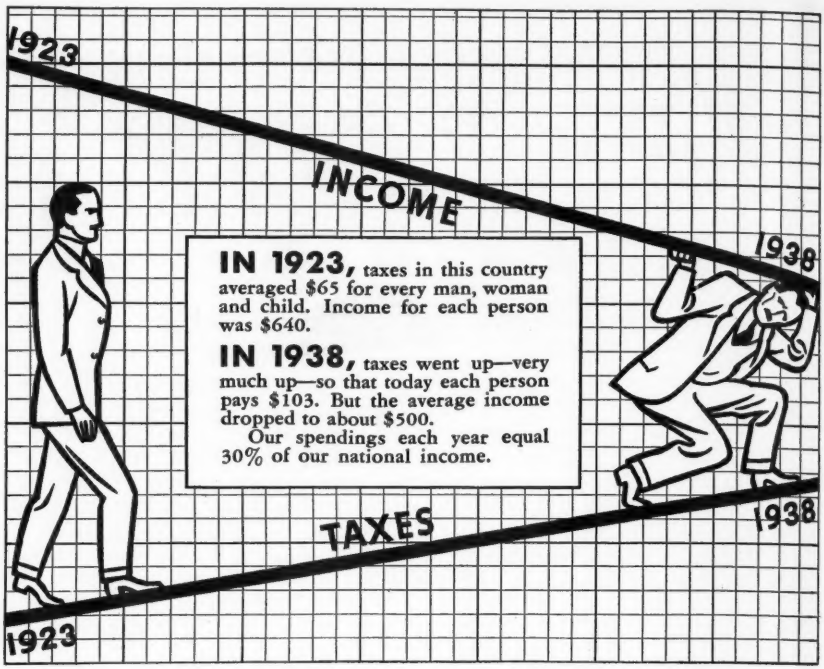

CAUSE and EFFECT

Taxes Higher—Income Lower: Jobless—Still Jobless

TAX MONEY is necessarily "overhead" expense. It does not go into wealth-producing activities—into permanent productive jobs.

Every business has "overhead". When it gets out of hand, everyone suffers—employee, owner, manager.

Government expenses—and exclusive of relief—have increased tremendously. This overhead affects personal income, stability of employment and the chance for industry to expand and make more jobs.

It is difficult for a family or a business to bring outgo into line with income by cutting out the near-essentials. But such cuts must be made to evade the distress of bankruptcy.

It is even more difficult for the nation to undergo the painful operation. But its overhead can be cut, and a move in that direction would do more to stimulate business activity than any other single thing.

If you do not act to this end through the men who represent you in Washington, taxes will continue up, income continue down—and the living standards of our people drop to those of other tax-ridden countries.

It is not yet too late—but it is very, very late!

Government Spending

1/4 of Our Work Day

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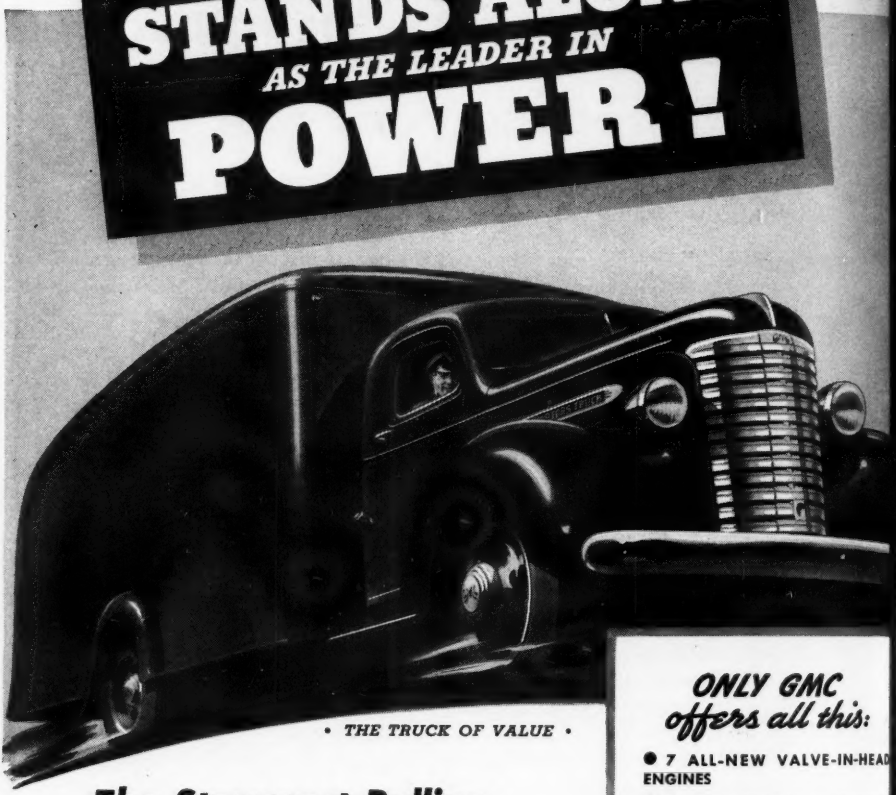

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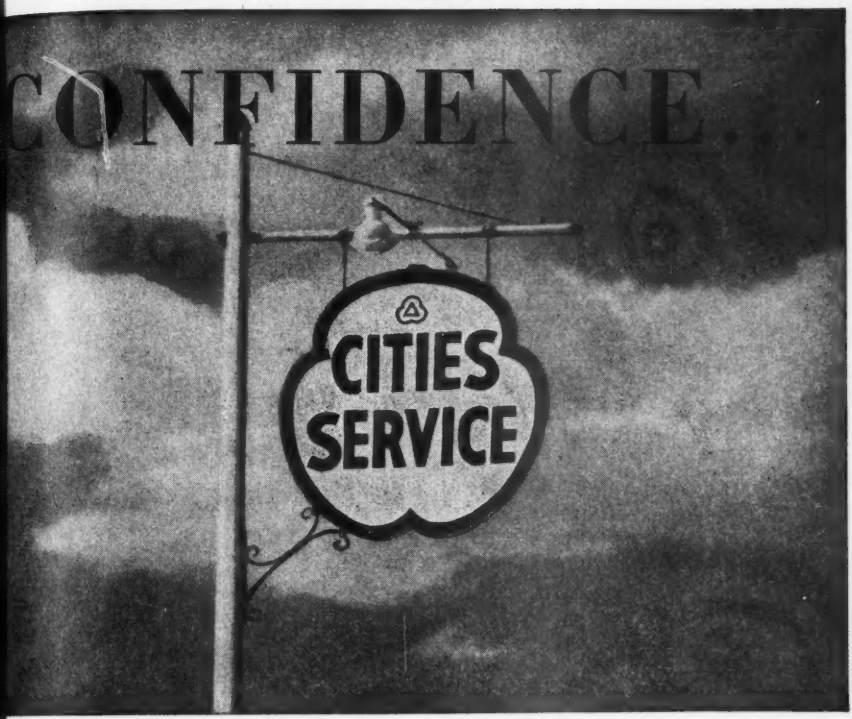

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